

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM
JULY 1, 1916, TO DEC. 31, 1919.

PUBLISHED BY AUTHORITY OF THE
CITY COUNCIL
OF THE CITY OF CHICAGO

Compiled and Edited by
SAMUEL A. ETTelson
Corporation Counsel



EDITOR'S NOTE.

This volume is the second of three volumes containing selected opinions of the Department of Law of the City of Chicago rendered during the administration of Hon. William Hale Thompson. The preface which appears in the first of these volumes contains a more extended statement, which applies to this volume and the one following this as well as to the first volume.

SAMUEL A. ETTELSON,
Corporation Counsel.

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OPINIONS
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JULY 1, 1916, TO DEC. 31, 1919.

Signature of Mayor on Appropriation Ordinances.

July 3, 1916.

HON. WILLIAM HALE THOMPSON, Mayor, Chicago, Illinois.
Dear Sir:

In response to your oral inquiry as to whether or not it was necessary for you to sign, prior to July 1, 1916, the appropriation ordinances adopted at the meetings of the Council held on June 26 and June 30, 1916, in order that the same would become law, we beg to say:

Section 18 of Article III of the Cities and Villages Act (Hurd's Statutes, 1915-1916, page 301), provides as follows:

“All ordinances passed by the City Council shall, before they take effect, be deposited in the office of the city clerk; and if the mayor approves thereof, he shall sign the same, and such as he shall not approve he shall return to the Council, with his objections thereto, in writing, at the next regular meeting of the Council occurring not less than five days after the passage thereof. Such veto may extend to any one or more items or appropriations contained in any ordinance making an appropriation, or to the entire ordinance; and in case the veto only extends to a part of such ordinance, the residue thereof shall take effect and be in force. But in case the mayor shall fail to return any ordinance, with his objections thereto, by the time aforesaid, he shall be deemed to have approved such ordinance, and the same shall take effect accordingly.”

Under this statute it has been held that the mayor is not required to exercise his prerogative to veto any ordinance or item thereof until the first regular meeting of the City Council after the expiration of five days after the ordinance

has been adopted, and that a prior publication of such ordinance is unauthorized.

City of Hillsboro v. Spangler, 146 Ill. App. 115.

The first regular meeting of the Council occurring not less than five days after June 26 is the meeting to be held on July 10; and therefore you have until such meeting on July 10 to determine whether you will sign or veto any of the appropriation ordinances or any of the items thereof, adopted at the meetings of the Council held on June 26 and June 30; and by the terms of the statute above quoted, if you fail to return any ordinance or item thereof, with your objections thereto, by the meeting to be held on July 10, you shall be deemed to have approved such ordinance or item, and the same shall take effect accordingly.

The inquiry has arisen whether there is a difference in this regard between appropriations made within the first quarter of the year and those made pursuant to the recent amendment to the statute, within the first six months of the fiscal year, but after the adoption of the annual appropriation bill. We think not.

It will be observed that the amendment allowing appropriations to be made during the first six months of the fiscal year, but after the adoption of the annual appropriation bill, is not a separate and independent section of the statute, but is merely a proviso added to the statute in effect prior to the adoption of such amendment.

Furthermore, the above section of the statute, relating to the time when appropriations may be made, contains no provision as to when the ordinances adopted thereunder must be signed or vetoed by the mayor, or when they will become laws without his signature; but those matters are governed by an entirely separate and independent section, viz., Section 18 of Article III, above cited.

In *King v. City of Chicago*, 111 Ill. 63, the Supreme Court decided that an appropriation ordinance adopted within the time allowed by the statute could be amended by the Council and readopted after the expiration of such time. The court held that in such a case the action of the Council in readopting the ordinance, as amended, related back to the

adoption of the original ordinance. But it is to be observed that in the case there before the court the amount of the appropriation was reduced.

In the subsequent and much later case of *The People v. C. B. & Q. R. R. Co.*, 266 Ill. 150, the King case was cited with approval, and the rule announced in the King case was held to apply to the action of the County Board and the president thereof, in making appropriations. But in this case of *The People v. C. B. & Q. R. R. Co.*, the Supreme Court decided that an appropriation could not be increased after the expiration of the time allowed by the statute for making appropriations.

While, as above stated, in the King case it appeared that the appropriation was reduced, yet we think the reasoning of the court in that case leads to the conclusion that the rule there announced would also apply where the amount of the original appropriation is not changed.

While in the cases cited it was not, in terms, decided what the effect would be if the mayor did not sign the appropriation ordinance within the time which the law allows him to do so, yet we do not think a valid distinction can be made on that ground. In other words, it seems to us that if the mayor does not sign or veto such ordinances within the time allowed him by the statute for doing so, they will become laws without his signature, under the statute as construed by the decisions above cited.

Very respectfully yours,

CHESTER E. CLEVELAND,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Itinerant Vendor of Drugs.

July 5, 1916.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your communication of May 26th,

requesting an opinion as to whether a peddler of drugs who has obtained a state license as an itinerant vendor of drugs in conformity with the provisions of Section 807 of The Chicago Code of 1911 is also required to obtain a City of Chicago peddler's license under Section 1760 of said code as amended.

In the case of the *People v. Wilson*, 249 Ill. 195, our Supreme Court held that Section 12 of the Medicine and Surgery Act was unconstitutional in so far as it required itinerant vendors of patent and proprietary medicines to take out a state license. As to the question as to whether or not itinerant vendors of drugs can be compelled to take out a city license, we beg to state that an opinion was rendered by this office on April 6, 1904, and also on October 21, 1908 (copies of which are hereto attached), holding that such vendors should be licensed by the city authorities as peddlers.

We see no reason why you should not abide by the conclusions set forth in the opinions above mentioned, namely, that an itinerant vendor of drugs should be required to take out a license as a peddler.

Very truly yours,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Liability for Signing Vouchers.

July 6, 1916.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Your communication of recent date, addressed to the corporation counsel, asking for advice as to the liability, if any, which is incurred by the commissioner of public works, city engineer and their subordinates in signing vouchers for payments out of the water fund for such purposes as sewer construction and other work entirely apart from the city water works, has been referred to me for opinion.

The question asked in your communication involves an answer to the question of whether or not money can be diverted from the water fund for other purposes. This can not legally be done. The question was fully considered and disposed of in the case of *People ex rel. City of Chicago v. Hummel*, 215 Ill. 71, and in numerous decisions of our Supreme Court it has been held that a city cannot use taxes levied for one fund for the expenses of another.

Fuller v. Chicago, 89 Ill. 294.

Kimball v. Peoria, 140 Ill. 157.

Washingtonian Home of Chicago v. City of Chicago, 157 Ill. 414.

Section 13 of the Charter Act of 1863, which relates to the water fund, was by the decision in the Hummel case above referred to, held to be in force and effect, notwithstanding the fact that the Cities and Villages Act was passed at a subsequent date to the Charter of 1863. Section 13 provided that—

“all funds derived from * * * water rents or otherwise for the water works of the city shall be exclusively used and appropriated by said boards to the objects and purposes pertaining to the water supply of said city herein specified; nor was the same or any part thereof to be used by said board or by said city for any other purpose.”

Following this decision, to use the water fund “for such purposes as sewer construction and other work entirely apart from the Chicago water works” would be an illegal diversion of said fund.

Where a duty is imposed on an officer which is purely ministerial he will be held liable for any injury to another which results from his failure to perform or from his performance of it in a negligent or unskillful manner. *People v. Bartels et al.*, 138 Ill. 323.

The signing of vouchers would unquestionably be held to be a ministerial act and as such, if wrongfully or negligently signed by an officer, would make the officer so signing thereby liable.

From the foregoing, I am therefore of the opinion that

the commissioner of public works would become liable, if he negligently or wrongfully certified to the comptroller to pay out of the water fund money in payment of work "entirely apart from the Chicago water works." Dil. on Mun. Corp., Vol. 1, 5th Ed., Sec. 441.

In the performance of ministerial acts by subordinate officers or agents, such as the city engineer and other employes of the commissioner of public works, who perform ministerial acts, such officers or agents are considered and treated as officers or agents of the government rather than the agents or employes of the officer under whom they are directly employed. The commissioner of public works could not be charged for the wrongful or negligent signing of vouchers by others to pay money out of a fund erroneously, unless the commissioner of public works, personally signed said vouchers, or authorized others to sign them. Such liability would fall upon the subordinate officer or agent.

Kleenan v. Southworth, 110 Mass. 474.

Robertson v. Sichel, 127 U. S. 507.

I am therefore of the opinion, that there is a liability incurred by the commissioner of public works, city engineer or any subordinate who wrongfully or negligently signs vouchers for payments out of the water fund for any purpose other than those specifically or impliedly included in Section 13 of the Charter Act of 1863.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Authority of Committee on Playgrounds, etc.

July 8, 1916.

TO THE HONORABLE, THE CITY COUNCIL

OF THE CITY OF CHICAGO.

Gentlemen:

On June 30, 1916, the following order was passed by

your Honorable Body, and appears on page 1144 of the Journal of the Proceedings of the City Council of that date:

“WHEREAS, The status of the Committee on Parks, Playgrounds and Beaches has been questioned as to its authority to employ help and enter into contracts; therefore be it

Ordered, That the corporation counsel be and he is hereby requested and directed to render an opinion to the City Council as to what authority said committee is possessed of and what its relation may be to the Bureau of Parks, Public Playgrounds and Bathing Beaches.”

Concerning this matter, we beg to advise you as follows: Upon an examination of the rules of the present City Council, as adopted at the meeting held on April 26, 1916, we find that under Rule 41 the present Committee on Parks, Playgrounds and Bathing Beaches is a standing committee of the City Council; that under Rule 42 it “shall act in conjunction with the mayor in all matters pertaining to small parks, playgrounds and bathing beaches” and that under Rule 44 “all matters relating to bathing beaches and recreation piers shall be referred to the Committee on Parks, Playgrounds and Beaches.” Rule 41 further provides that the membership of the committee shall consist of nine aldermen to be selected by the Council and six other citizens to be appointed by the mayor to act in an advisory capacity.

We further find that the Bureau of Parks, Public Playgrounds and Bathing Beaches was created under Section 1700 of The Chicago Code of 1911, and that said section, as amended February 19, 1915, reads as follows:

“1700. BUREAU ESTABLISHED.) There is hereby established a bureau of the municipal government to be known as the Bureau of Parks, Public Playgrounds and Bathing Beaches, which shall embrace the superintendent of city parks, superintendent of public playgrounds and bathing beaches, the secretary, and such other employes as the City Council may by ordinance provide. Such bureau shall be under the sole supervision and control of the Special Park Commission as constituted by the rules of the City Council.”

We are of the opinion that the Committee on Parks, Play-

grounds and Bathing Beaches under the rules of the City Council is limited in its power and authority to make recommendations to the City Council upon such matters as may be referred to it by the City Council.

We are also of the opinion that the Committee on Parks, Playgrounds and Bathing Beaches, created under the rules of the present City Council, cannot be considered as the Special Park Commission named in Section 1700 of The Chicago Code of 1911.

Upon an investigation of the Journal of the Proceedings of the City Council we find that said commission originated with a resolution adopted November 6, 1899, and appearing in the Journal of the Proceedings of that date on pages 1535, 1536 and 1537, which resolution reads as follows:

“WHEREAS, the present park system of the City of Chicago has been and now is a great blessing to our citizens in giving to them the fresh air and sunshine which are so difficult to obtain in a crowded and growing city, yet are so valuable in preventing crime and promoting cleanliness and diminishing disease; and,

“WHEREAS, this system, great and beneficent as it is, fails from lack of small local recreation grounds to reach many of our citizens in the crowded central wards who most need such opportunities, so that the present system urgently needs to be supplemented in those districts by breathing places of various sorts, including small parks, playgrounds for children, swimming places, public baths, parkways and the like; and,

“WHEREAS, large districts, both within and beyond the city limits, have been opened up and become densely populated since the establishment of our present parks and in view not only of this growth in population, but of the corresponding growth certain to occur in the future, there is need for an extension of our park system and connecting boulevards into these regions; and,

“WHEREAS, land in and about the city can now be obtained at prices much lower than will have to be paid when, by increase in density of population, the need for greater park accommodation shall be felt more seriously than at present; and,

“WHEREAS, all these facts are indicated and emphasized by numerous movements in various parts of the city and suburbs, including many such movements by civic and commercial clubs, professional, society and

local improvement organizations, from which, in the opinion of this Council great benefits might result, if their efforts were related to those of an official city commission, while such benefits can only be partial and inadequate unless so organized under a general scheme, fair and adequate to the whole population; therefore, be it

“RESOLVED, By the City Council of the City of Chicago, that the present situation of the City of Chicago with regard to parks and other recreation grounds, shall be systematically studied so that a consistent plan may be outlined, to be followed as opportunity may serve, that the public may become informed as to the opportunity in this city and the present accomplishment in other cities, and that waste of labor and cost in spasmodic, separate and unrelated movements, which must of necessity be imperfect and insufficient, may be saved; and, to this end, be it

“RESOLVED, that a committee shall be constituted, as hereinafter stated, which shall systematically procure information as to all facts bearing upon the needs, present and future, of the city, in regard to the matters above stated, and shall prepare recommendations for a systematic and concerted plan for the satisfaction of such needs by the addition of parks or other improvements above suggested either within or without the limits of this city as they may find desirable which they shall as soon as practicable report to this Council. As members of said committee, His Honor, the Mayor, is authorized and requested to appoint nine members of this Council, three from each division of the city, and six citizens not holding official positions, including one lawyer, one civil engineer, one landscape gardener or architect, one physician or sanitary engineer, who shall be of recognized ability in their profession. Each of the three park boards is authorized and requested to appoint one of its members, officers and employes as a member of said committee. Such committee is authorized to add additional members, not exceeding six; and be it further

“RESOLVED, that the said committee be and it is hereby authorized to employ such clerical assistance as may be necessary and as may be approved by the mayor, such assistants to receive such compensation as the mayor shall approve.”

This commission was continued by a resolution adopted at the beginning of every council year until February 19, 1915, when the City Council amended the Rules of the Council

by adding said commission to the standing committees of the Council.

It also on this date amended Section 1700 of The Chicago Code of 1911 by providing that "such bureau shall be under the sole supervision and control of the Special Parks Commission as constituted by the Rules of the City Council," which formerly read: "Such bureau shall be under the sole supervision and control of the Special Parks Commission as constituted by a resolution of the City Council passed on the 6th day of November, 1899, and amended on the 27th day of November, 1899."

The City Council and its committees act in a legislative capacity and are the legislative department of the city government. If it should be construed (which construction we do not think is admissible), that the Committee on Parks, Playgrounds and Bathing Beaches is the commission which is to have sole supervision and control of the bureau as established by Section 1700 of The Chicago Code of 1911, then said committee is taking upon itself executive functions not given to it by statute. This committee cannot recommend legislative action to the City Council, pass on such recommendations as aldermen from their respective wards, and then act as members of a commission or committee to carry out and execute the legislative action taken by them as aldermen.

"The division by the Constitution of the powers of the government of the state into three departments, namely, legislative, executive and judicial, applies to municipalities which are state agents as well as to their principal, the state."

People v. Olson, 245 Ill. 288.

Respectfully submitted,

GOTTHARD A. DAHLBERG,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Unified Operation of Surface Street Railways.

July 12, 1916.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your letter dated May 10, 1916, in which you request an opinion as to the construction which should be placed upon that part of Clause (b), Section 8 of the ordinance "Authorizing unified operation of the surface street railways in the City of Chicago," passed by the City Council on November 13, 1913, which reads as follows:

"Wherever pipes or other underground metallic work are found to be electrically positive to the rails or to the railway return circuit, they may, upon the direction of the Board of Supervising Engineers, be connected by conductors so arranged as to prevent the flow of current from the pipes into the ground."

Your letter points out that while this language provides for connections with "pipes or other underground metallic work," it continues, "so as to prevent the flow of current from the pipes into the ground," and you wish to be advised whether the word "pipes" may be construed as meaning "pipes or other underground metallic work."

In *Burke v. Monroe County*, 77 Ill. 610, 614, the court said:

"In *Mason v. Finch*, 2 Scam. 223, it is said, in construing statutes, courts look at the language of the whole act, and if they find, in any particular clause, an expression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect, from the more large and extensive expressions used in other parts, the real intention of the Legislature, it is their duty to give effect to the larger expressions."

We are of the opinion that the purpose of the above provision of clause (b) was to afford a means by which not only "pipes," but also "other underground metallic work" of the City of Chicago or the Sanitary District may be protected from damage caused by the flow of current into the

ground, and under the principle of the decision of the Supreme Court above cited, we believe that the word "pipes" should be construed as having the larger meaning.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Entry of Premises Containing Nuisance.

July 17, 1916.

HON. CHAS. C. HEALEY, General Superintendent of Police.

Dear Sir:

In reply to your letter of July 13, 1916, regarding the question of the alleged nuisance at 2421 Wilson avenue, and inquiring as to the power of the Police Department to enter said premises without any formal process, in case the demand for the cats and dogs is refused, and remove said cats and dogs, and inquiring as to the general powers of the department in such matters and the method of procedure, I am of the opinion that the Health Department and the Police Department have proceeded, up to the present time, in the manner prescribed by the code; that the Health Department having given the proper notice and the nuisance not having been abated by the owner of the premises, complaint should be filed and the case be prosecuted as any other case involving a violation of Section 1425 of the Code.

It is true that the right is given the city, under the statute, to declare what shall be a nuisance and to abate the same and to impose fines upon parties who may create, continue or suffer nuisances to exist, but the Council can not arbitrarily declare that a nuisance, which is not in fact a nuisance, and the same rule would apply to any officer such as the commissioner of health.

So an ordinance passed in pursuance of such delegated power would be subject to the rule that it must be reason-

able, and the courts reserve the right in the final analysis to judge its reasonableness.

T. W. & W. B. W. Co. v. City, 67 Ill. 47.

I have discussed this matter with Sergeant Naughton of the Police Department and Mr. Ball of the Sanitary Division of the Health Department, and the facts in their possession regarding the condition of affairs at the above described premises do not indicate such a serious menace to the public health as would warrant seizing or destroying property summarily. In spite of the provisions of Section 1427 regarding the right of the commissioner to summarily abate a nuisance, any officer undertaking to abate one by seizing or removing the animals might be compelled to respond in damages, as the question of the justification of such a course of conduct would be an open one. A mere determination by an officer in an *ex parte* proceeding that certain conditions constitute a nuisance, is no defense to an action by the owner for damages.

Miller v. Horton, 152 Mass. 540.

In addition to proceeding under the provisions of the code, a nuisance, of course, may be abated by injunction either on the part of the city in the case of a public nuisance, or on the application of adjoining property owners who might have less difficulty in proving the existence of a nuisance as to themselves, than the city would in showing a public nuisance.

Regarding your inquiry as to the right to enter the premises without any formal process and remove the cats and dogs, I am of the opinion that under the authority of *Cozzens v. Mason*, 109 Mass. 275, the police have no power, in cases similar to this one, to enter a dwelling house without the express or implied consent of the owner for the purpose of summarily seizing or destroying dogs or cats.

This opinion is limited to the case under consideration and does not deal with the general power of the city to summarily abate nuisances. This opinion is not to be understood as being in conflict with any of the following former opinions of this office, viz.:

Opinion by Corporation Counsel Tolman to R. B. Wilcox, Secy., Apr. 7, 1905.

Opinion by Asst. Corporation Counsel Jampolis to Frank I. Sennett, Chairman, May 28, 1907.

Opinion by Asst. Corporation Counsel Otis to John J. Hanberg, Comr., June 5, 1907.

Opinion by Asst. Corporation Counsel Grossman to J. B. Young, Comr., Jan'y, 25, 1913.

Opinion by Asst. Corporation Counsel Hornstein to Carter H. Harrison, Mayor, Apr. 10, 1913.

Opinion by Asst. Corporation Counsel Cagney to Chas. F. Seyferlich, Fire Marshal, June 2, 1913.

Opinion by Asst. Corporation Counsel Bean to Willis O. Nance, Chairman, Oct. 14, 1914.

Yours truly,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Parents' Neglect of Necessary Medical and Surgical Aid to Children.

July 20, 1916.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

I have your letter of July 7, 1916, inquiring as to the duties and powers of the commissioner of health in cases where parents and guardians refuse or neglect to furnish the necessary medical or surgical care for their children, and inquiring particularly regarding the case of a girl two years of age whose parents refused to allow a physician called in to give the proper treatment for a broken leg, and indicating that unless such treatment is given there will be a serious deformity.

Ample provision seems to have been made by the state in the Criminal Code for cases such as these.

Section 53 of Chapter 38 of Hurd's Revised Statutes of 1915-1916 provides as follows:

“Any person who shall willfully and unnecessarily expose to the inclemency of the weather, or shall in any

other manner injure in health or limb, any child, apprentice, or other person under his legal control, shall be fined not exceeding \$500, or imprisoned in the penitentiary not exceeding five years."

Section 42d of Chapter 38 of Hurd's Revised Statutes of 1915-1916 provides:

"It shall be unlawful for any person having the care or custody of any child, willfully to cause or permit the life of such child to be endangered, or the health of such child to be injured, or willfully cause or permit such child to be placed in such a situation that its life or health may be endangered."

Another section provides a penalty for a violation of said Section 42d.

In a recent case, decided in Oklahoma, *Lawrence Owens v. State of Oklahoma*, 36 L. R. A. (n.s.) 633, it was held that the question of the necessity for medical treatment is a question of fact for the jury in any case, and an instruction of the trial court that religious belief would not constitute a defense to such prosecution is correctly given. There is a note in this case which indicates that this decision follows the decision of other states in similar cases.

As this state statute covers the cases you refer to, we would suggest that whenever any such cases arise they should be brought to the attention of the state's attorney for such action as he may deem proper.

Very truly yours,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Contemplated Garage on Berkeley Avenue Between
52nd and 53rd Streets.**

July 20, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication of the 13th instant, addressed to the

corporation counsel in the above matter, has been referred to the undersigned for attention.

The situation, as we understand it from your letter, is that the above proposed garage is located within 200 feet of the Home for Jewish Friendless and Working Girls, same being located on Ellis avenue, the question being whether or not this institution is a hospital as contemplated in the ordinances prohibiting a garage within 200 feet of same.

The section in the building ordinances relative to the garage prohibition is in the following words:

“It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet from any building used as and for a hospital, church or public or parochial school, or the grounds thereof. * * *”

The writer made an investigation of this home and found that they have a regularly equipped hospital in connection with same, parts of said hospital being located on all three floors of this building.

“A hospital is an institution for the reception and care of sick, wounded, infirm, or aged persons.” 21 Cyc. 1105, citing Bouvier’s Law Dictionary.

In view of this situation, as we find it, there seems to be no question as to the character of this home relative to its being a hospital. It is, therefore, our opinion that to issue a permit for the erection of this garage would be contravening the provisions of this ordinance.

Yours very truly,

W. H. DEVENISH,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Construction of Bakery Adjacent to Private Barn.

July 20, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication of the 21st instant in the above mat-

ters, addressed to the corporation counsel, has been referred to the undersigned for attention.

The section of the Code involved in your query is as follows:

“FRONTAGE CONSENTS—BUSINESS OF SELLING PROVISIONS, ETC., IN RESIDENCE DISTRICTS.) It shall be unlawful for any person, firm or corporation to carry on the business of selling meats, poultry, fish, butter, cheese, lard, vegetables or any other provisions from any place of business located in any block in which all the other buildings are used exclusively for residence purposes, without first securing and filing with the city collector of the City of Chicago the written consent of three-fourths of the property owners according to frontage on both sides of the street in the block in which the building to be thus used is located, provided in determining whether all the buildings in said block are used exclusively for residence purposes, any building fronting on another street and located upon a corner shall not be considered.”

The pencil sketch you forwarded with your letter shows this to be a strictly residential district, the question being whether or not this contemplated bakery can be erected without frontage consents.

In the case of *City of Chicago v. Drogasawacz*, 256 Ill. 34, the court passed on an ordinance which defined a bakery as: “any place used for any purposes of mixing, compounding or baking, for sale or for purposes of a restaurant, bakery or hotel, any bread, biscuits, pretzels, crackers, buns, rolls, macaroni, cake, pies, or any food product of which flour or meal is a principal ingredient. * * *”

The point at issue being whether or not the city had the power to license and regulate bakeries, the court, at page 36, said:

“The plaintiff in error has been granted the power, in Section 50 of Paragraph 62 of the Cities and Villages Act, ‘to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other provisions, and to provide for place and manner of selling the same’; and in Section 53 of the same paragraph the power ‘to provide for and regulate the inspection of meats, poultry, fish, butter, cheese, lard, vegetables, cotton, tobacco, flour,

meal and other provisions.' Manifestly, the phrase 'other provisions,' in these two sections, in the connection used, includes the bakery products covered by the ordinance here in question, such products being articles of the same character as those specifically enumerated. (*Salt Lake City v. Howe*, 106 Pac. Rep. (Utah) 705; 32 Cyc. 742.)"

In view of the position taken by our Supreme Court in the above case there can be no doubt that this contemplated bakery comes within the provisions of Section 717½, and frontage consents are necessary, if the other buildings in this block are used exclusively for residential purposes.

Relative to your second inquiry as to what construction should be placed upon the private barn immediately adjoining this location, we will say that the barn is on the rear of a lot upon the corner and is a part of the corner residence and should be treated as such, assuming, of course, that it is used in connection with the house and for no other purpose.

Our Appellate Court (*Fuchs v. Karott*, 151 Ill. App. 612), in treating of this proposition, said, at page 616:

"While it is generally true that a demise of premises for residence purposes, describing them by street and number, would probably include as appurtenances a barn and stables on the rear of the lot on which the residence stood, the same rule would not necessarily apply to business property, especially where as in the case at bar, the barn and shed were apparently only partly on the land described in the lease. We think the rule here applicable is correctly stated in *Patterson v. Graham*, 140 Ill. 531, viz.: 'that by construction the lease carried so much of the lot on which the building stood as was necessary to the complete enjoyment of the building for the purpose for which it was rented.' "

Yours very truly,

W. H. DEVENISH,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Re-Advertisement of Contract.

July 21, 1916.

HON. JOHN ERICKSON, City Engineer.

Dear Sir:

In reply to your oral request for an opinion relative to the architectural terra cotta for Mayfair Pumping Station, we understand and assume that the pertinent facts are as follows:

That the city duly advertised for and received bids for this work, the lowest bid being that of the Northwestern Terra Cotta Company for \$54,500, alternate \$54,250;

That the city's estimate for this work was \$50,000;

That solely for that reason you felt obliged not to accept such bid of the Northwestern Terra Cotta Company for \$54,500, alternate \$54,250;

That upon this situation being brought to the attention of the Northwestern Terra Cotta Company it signified its willingness to further reduce the amount of its bid so as to come within the amount of the city's estimate, and that company has indicated its willingness to accept a contract to do this work for the sum of \$49,975.

The question is, whether the city is, under these circumstances, obliged to re-advertise for this work, thereby putting itself to a very considerable expense and delaying the work for quite a long time.

We think not. The Northwestern Terra Cotta Company, being the lowest and best bidder, we cannot perceive how any one can possibly be injured if the Northwestern Terra Cotta Company reduces its bid so as to come within the city's estimate, and then enters into a contract to do the work for this reduced amount. And obviously, the city will be benefited by following this course.

This position is, we think, sustained by the case of *The Sanitary District of Chicago v. McMahon & Montgomery*, 110 Ill. App. 510, in which the court, on page 519, said:

"In contemplation of law Green's Dredging Company was not a bidder, because its bid did not conform to the advertised requirements. The contract was let to

the next lowest bidder, McMahon & Montgomery Company, at a price less than its bid, without any re-advertising, and it is now claimed that this avoided the contract. No authorities are cited to sustain the contention. If (so far as this point is concerned) it was lawful to let the company have the contract at the price (twenty-three cents) bid by it—and this is not denied—then it was not contrary to the statute, or to public policy, or to the duty appellant owed to the public, for its trustees, by persuasion, to induce that company to consent to a reduction of the price from twenty-three cents to twenty-one cents).’’

Very truly yours,

MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

**Liability of City for Loss of Valuables from Lockers at
Bathing Beaches.**

July 24, 1916.

HON. EUGENE H. BLOCK, Chairman, Committee on Parks,
Playgrounds and Bathing Beaches.

Dear Sir:

Replying to letter of Mr. Walter Wright, secretary, of the 8th instant, in which he states that the City of Chicago is operating, through its committee on parks, playgrounds and bathing beaches, the Clarendon Municipal Bathing Beach, and that a charge of 10 cents is made for all persons over 15 years of age for the use of locker, suit and towel, valuables being checked free in envelopes, a sample of which was transmitted with letter.

He asks to be advised whether or not the city can be held liable for the loss of valuables checked in this way or for the loss of any clothing or other articles that might be stolen from the lockers. He also asks whether or not the posting of signs that the city will not be liable for any loss will release the city from such liability, and whether the city can state that

it will be responsible for losses up to a certain limit, of say \$100.

The law applicable to the subject matter of your inquiry, is that reasonable care must be exercised by anyone who accepts, for safe keeping, valuables or other articles. Where such reasonable care is not exercised, the party accepting such valuables or other articles will be liable for their loss. The posting of signs that the party accepting articles for safe keeping will not be liable for their loss, will not release him. The liability may, however, be limited by contract.

However, under date of July 8, 1916, we advised the City Council that the committee of which you are chairman, is a standing committee of the City Council, and that its powers are limited to making recommendations upon matters presented to it by the City Council.

We are of the opinion that the members of this committee, in taking upon themselves the responsibility of operating the bathing beach, are assuming a risk of being held individually liable for any loss of valuables or of any clothing or other articles stolen from the lockers.

Yours very truly,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

**Failure of Contractor to Complete Contract Within
Time Limit.**

July 24, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

In Re: Withholding from the contractors on the Webster avenue bridge and the Belmont avenue bridge certain sums of money, otherwise due them, because of their failure to complete their contracts at the times provided in the original contracts for the completion thereof, such with-

holding being based upon the liquidated damage clause in the contracts.

These liquidated damage clauses are legal and binding upon the contractors, and even the City Council cannot, after the contract has been fully performed, waive or release such damages without a valuable consideration for doing so. (*Ludlow Valve Manufacturing Co. v. City of Chicago*, 181 Ill. App. 388.)

It is to be noted that the court in the case cited, expressly limited its opinion to the case before it, where there was no real controversy that the contractor was liable for the liquidated damages, and the City Council after the work was done granted an extension of time to complete the same.

Obviously, however, the contractor must have been guilty of delay for which he is responsible before he can be charged with damages for delay under the liquidated damage clause.

For the delay caused by the city the contractor cannot be so charged. Furthermore, notwithstanding the contract makes the time of the performance an essential term of the contract, still the city may, *during the progress of the work*, expressly or impliedly waive such term and if it does so and acquiesces in the delay under such circumstances as to lead the contractor to believe that if he goes on and completes the work under the contract he will not be charged with damages on account of such delay, then in our opinion the city will not be entitled to charge him with damages for such delay.

In 9 Cyc. (p. 608) it is said:

“Even where time is expressly declared to be of the essence of the contract, it may be waived by the conduct of the party for whose benefit the stipulation is made; as for instance where he recognizes the contract as still in force after the time for performance has passed or directs changes making a longer time necessary. If the party prevents performance by the other, he cannot insist on the stipulation.”

In 4 McQuillin on Municipal Corporations, at Section 1935, it is said:

“Unless restricted it is competent for a municipality to extend the time for the performance of a contract for

public improvements, *prior to the expiration of the period for the completion named therein*, but ordinarily not afterwards; and such extension does not constitute a new contract. But if the law under which the contract is executed makes time of the essence of the contract an agreement extending the time for completing the work made after the expiration of the time originally agreed on, is void as against the municipality. However, it has been held that although time may be of the essence of the contract it may be extended if the law so provides."

Possibly after such waiver the city could give notice of its intention not to be bound thereby and recover damages for the delay from the date of such notice; but we regard this as a rather doubtful proposition.

As the contracts pertaining to the construction of the bridges above mentioned vest in the commissioner of public works control of the work under such contracts, it is our opinion that he is authorized to act for and bind the city in the matter of such waiver and acquiescence.

We assume that such waiver and acquiescence would be based wholly on conditions showing it to be to the best interest of the city that they should be allowed and not upon a mere desire to help out the contractor.

It seems to us that the city must recognize that with respect to the time specified for the performance of contracts, the commissioner of public works under such contracts as are now under consideration, must have a discretion to determine whether the city will insist upon "the letter of the bond," it being manifestly true that sometimes it is more important to have the work finished than to have it finished at the exact time specified in the contract; and it being further true that sometimes conditions may arise which would make it very much to the advantage of the city that the exact time limit should not be insisted upon.

Of course such discretion in the commissioner of public works should be exercised with great caution and perhaps it should be added only very sparingly and in cases where its exercise is clearly proper.

All this leads up to the proposition that the ultimate re-

sponsibility, in such cases as we are now considering, rests upon the commissioner of public works; and he having, as we are advised, after due consideration of all the facts and circumstances issued the vouchers, the comptroller will be justified in honoring the same.

Thus, in 2 Dillon on Municipal Corporations (5th Ed.), at Section 823, it is said:

“Contracts for public improvement usually provide that the work shall be performed and the materials furnished under the direction and subject to the control of an engineer appointed by the city and the officer of the city having charge of the improvement. It is also usual to insert provisions referring to the engineer all questions in relation to the work and the construction thereof, and the money is made payable to the contractor *upon the performance of the work to the satisfaction of the engineer and the officer* and upon the production of the certificate or estimate of the engineer. When the work has been performed pursuant to such a contract and the engineer has passed upon the quantity and quality of the work, and issues his certificate of performance, such certificate is binding upon both parties, and can only be impeached for fraud or palpable mistake.”

And in a note to the foregoing section, appearing on page 1242, it is said:

“When, pursuant to contract, the officer designated thereby has *accepted the work* and passed upon the claim of the contractor, the *city comptroller* has no discretion to refuse to pay the claim on the ground that the work was not done according to contract, or that it was improperly done in some respect.”

Sections 2103 and 2107 of the municipal code (The Chicago Code of 1911, pages 661 and 663) appear to conform with the principles of law announced in the foregoing quotations. Such sections are respectively as follows:

“2103. PAYMENTS ON CONTRACTS—HOW MADE.) All moneys payable by the city, for work done or supplies furnished by contracts or otherwise, under the department of public works, shall be paid by the comptroller upon the requisition of the commissioner of public works.”

“2107. CONTRACTS—ESSENTIAL CLAUSES—RESERVATION OF PAYMENT.) In all contracts executed by said commissioner, on behalf of the city, the right shall be reserved to said commissioner to finally decide all questions arising as to the proper performance of the work; and in case of improper construction, or non-compliance with the contract in any manner, to suspend such work at any time or to order the partial or entire reconstruction of such work if improperly done, or to declare the contract forfeited, and to re-let the same without further advertisement; and to adjust the difference of damages or price, if any, which the contractor, failing to properly construct such work in such cases of default, should pay to the city, according to the just and reasonable interpretation of said contract. In cases where the contractor shall proceed to properly perform and complete his contract, the said commissioner may from time to time as the work progresses, grant to such contractor an estimate of the amount already earned, reserving 15 per centum therefrom, which shall entitle the holder to receive the amount that may be due thereon when the money applicable to the payment of such work shall be available, and the condition annexed to such estimate, if any, shall have been satisfied.”

In this opinion we are assuming that proper appropriations have been made and funds are on hand for the payment of the amounts due under the contracts, and we are not dealing with the question of the powers of the comptroller in case there has been no appropriation or there are no funds available for such purpose.

Of course it is necessary in the practical carrying out of such contracts as we are considering that there should be co-operation between the offices of the comptroller and of the commissioner of public works, and to that end we suggest that much delay and confusion with respect to vouchers issued in payment for such work will be obviated if the office of the commissioner of public works notifies the office of the comptroller from time to time of any material stoppage of any such work or of any extension of time thereon and keeps the office of the comptroller posted in a general way with regard to the progress of the work, especially so far as the same may affect the vouchers which may be issued on account thereof.

And it goes without saying that the office of the comptroller in case such office believes that anything exists on account of which the vouchers should not be honored, should call such matter to the attention of the office of the commissioner of public works, to the end that the interests of the city may be fully safeguarded.

We are writing this letter in duplicate—one for the commissioner of public works and the other for the city comptroller, so that each will understand the conclusion at which we have arrived.

If there are any points connected with this matter upon which either of you desire to confer with us, we shall be glad to consider the same with you.

Very truly yours,
FRANK S. RIGHEIMER,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Public Dancing at the Municipal Pier.

July 25, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

We are in receipt of your request for an opinion as to the validity of the following order passed by the City Council, July 10, 1916.

“ORDERED, That the commissioner of public works be and he is hereby authorized and directed to furnish public dancing at the Municipal Pier for the summer months of this year, either by awarding a contract, as a result of competitive bidding, to private interests to conduct dancing at a maximum charge to the public of five cents per dance, per couple, or by making the necessary arrangements for conducting public dancing under the supervision and management of the City of Chicago.”

The first question for us to determine is whether or not the City Council possesses the power to pass an order or

ordinance directing the commissioner of public works to make arrangements for conducting public dancing under the supervision and management of the City of Chicago. Such power as the City Council may have over amusements must be found if at all in Clauses 41, 58 and 92 of Section 1, Article V, of the Cities and Villages Act. These various clauses are as follows:

“Forty-first: To license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals, and other exhibitions, shows and amusements and to revoke such license at pleasure.

“Fifty-eighth: To regulate places of amusement.

“Ninety-second: To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalks, or to frighten teams and horses.”

The City Council of the City of Chicago possesses only such power to pass acts of legislation as has been conferred upon it by the General Assembly of the State of Illinois, with the sole exception that under its implied power it may legislate upon matters that are conducive to the public peace, health and safety of the inhabitants of the city.

It has been repeatedly held by the Supreme Court of the various states that in the absence of express power, a municipal corporation has no power to make a contract to provide entertainments or amusements. Dillon on Municipal Corporation states (Sec. 309, p. 566, Vol. I):

“Without express power a public corporation cannot make a contract to provide for the celebration of the 4th of July, or to provide an entertainment for its citizens or guests. Such contracts are void, and although the plaintiff complies within all his power, he cannot recover of the corporation.”

Dillon on Mun. Corp.

Hodges v. Buffalo, 2 Denio (N. Y.) 110.

Cornell v. Gilford, 1 Denio 510.

Hood v. Lind, 1 Allen (Mass.) 103.

In conclusion, we desire to state to you that the passage of the above order directing you to make necessary arrange-

ments for conducting public dancing, under the supervision and management of the City of Chicago, is beyond the power of the Council, and that you should not, in any manner, attempt to comply with it. If you should enter into any such contract, it might result in your becoming personally liable for any damages that might result from making such arrangements or the carrying on of such entertainments.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

The Erection of Billboards.

July 25, 1916.

FRIEND OF THE PEOPLE, c/o CHICAGO TRIBUNE, CHICAGO.

Dear Sir:

I have had assigned to me your request of the 19th inst., transmitting communication of Mabel Galpper, No. 1432 East 66th place, in which information is asked relative to the means to be adopted for the purpose of removing signboards which have been erected on the vacant lot at the corner of 66th place and Dorchester avenue. It is stated that part of the block on one side of the alley is occupied by stores, the remainder of the street and all surrounding streets being used for residential purposes.

In making reply we wish to advise you that there is in existence at the present time an ordinance which provides that it shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard

is to be erected, constructed or located. Such written consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such billboard or signboard.

On July 21, 1913, the Thomas Cusack Company, a corporation, filed a bill in equity in the Superior Court of Cook County against the City of Chicago, mayor of the city and other officials, to restrain the enforcement of an ordinance regulating the erection and maintenance of billboards in residence blocks in said city, the ordinance herein made mention of being the same as set forth above.

The bill further alleged that a large number of billboards had been erected since the passage of the said ordinance without complying with its provisions in regard to obtaining the consent of the majority of the property owners fronting on both sides of the street in the blocks in which said billboard had been erected and maintained. The defendants answered the bill in which the alleged invalidity was denied, the answer stating that the ordinance was regularly passed by the City Council pursuant to express legislative authority and that it was a proper exercise of the police power of the City of Chicago and the State of Illinois; and it denied that the ordinance was invalid for any reason and particularly that it was not invalid because discriminatory, oppressive or unreasonable; upon the hearing of the cause a decree was entered in accordance with the prayer of the bill, perpetually enjoining the enforcement of the ordinance. The defendants below prosecuted an appeal to the Supreme Court of this state, the sole question involved being the validity of the ordinance in question.

The Supreme Court found in passing upon the ordinance that it was neither unreasonable nor oppressive because of its requirements, and held that the location and maintenance of signboards were subject to regulation under the police power of the municipality and that a requirement of frontage consents of property owners within reasonable limits was a proper mode of exercising the power of regulation vested in the municipality. The decree of the Supreme Court was

reversed and the cause remanded to that court with directions to dismiss the bill for want of equity.

From this decision of the Supreme Court the Thomas Cusack Company have prosecuted an appeal to the United States Supreme Court, which appeal remains undetermined.

In the interim, permits are being issued by the commissioner of buildings for the erection of signboards in cases where the provisions of the ordinance have been complied with. As to the signs you refer to, the necessary signatures have been obtained and the permit has been issued the Thomas Cusack Company to erect and maintain the same.

In view of the fact that there has been a complete compliance with the provisions of the ordinance, to wit, the acquiring of the consent of a majority of the property owners within the block in which these signs are erected, a petition as suggested by your inquirer would be of no avail.

Very truly yours.

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Extension of Street Railway on Lake Park Avenue.

July 26, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We have had referred to us a communication dated June 23, 1916, signed by the Kenwood Residents' Association addressed to you and accompanied by an opinion of Messrs. Church & McMurdy under the same date, addressed to the Kenwood Residents' Association. In this communication it is asserted that the ordinance passed by the City Council on May 15, 1916, granting the Chicago City Railway Company the right to construct an extension in Lake Park avenue from East 47th to East 55th streets is void, because of insufficient frontage consents.

The opinion accompanying the communication is presented with a view of upholding this contention. It is claimed—

“*First*: That at the southwest corner of 49th street and Lake Park avenue there is a triangular piece of ground which is a public park, dedicated on November 21, 1904, as a public park and so maintained by the South Park Commissioners continuously from that day to this.”

As to this so-called park strip, the record shows that this consists of a portion of 49th street vacated and set apart as a small public park (see record of Council Proceedings of November 21, 1904, pp. 1604 and 1606), the title to and control of which has always been exclusively in the city. This department has already passed upon the subject-matter of this claim, and in opinions of July 15, 1915, to the superintendent of maps and of November 24, 1915, to the commissioner of public works, both called for by reason of petitions or objections presented by this same Kenwood Residents' Association, this strip has been treated as a bit of park in the street, and that said frontage should not be included in figuring the total frontage consents required.

We are informed that the South Park Commissioners have never had or claimed to have any title or interest in this strip and have never exercised any jurisdiction or control over it.

It is claimed—

“*Second*: The following persons whose names appear of record as signing the petition were not owners of the property signed for at the time that the ordinance went into force:

a. Nellie K. Berkey owning.....	37.63 feet
b. Michael R. Kelly.....	50. feet
c. Michael R. Kelly.....	146. feet
d. Thomas McGrath	56. feet
e. Anna Christian	30. feet

319.63 feet”

As to this, we beg to advise you as follows:

(a) The signature of Nellie K. Berkey. The title of this property is somewhat complicated by reason of it being

involved in litigation. The records show that on March 28, 1916, a decree was entered for the sale of the property and that a master's certificate of sale was issued to Victoria T. Artz on April 25, 1916, and recorded April 28, 1916, but that no deed thereto has been delivered. We gave no opinion as to whether Nellie K. Berkey could consent to the extension.

(b and c) The signature of Michael R. Kelly. When Mr. Kelly signed the petition, he signed for himself as the holder of the legal title in trust for one Mrs. Theresa W. Snyder, and also for Mrs. Snyder as the equitable and beneficial owner and pursuant to express written authority from her. A copy of a statement signed by Theresa W. Snyder setting forth the facts concerning her interest and that of Michael R. Kelly in the lots signed for and the authorization of Mrs. Snyder to Kelly to sign the consent for and in her behalf, also a copy of the original authorization in writing signed by Mrs. Snyder addressed to Kelly are hereto attached as Exhibits A and B, the originals being in the possession of Mr. Kelly.

Looking at the situation as it existed at the time of the passage of the extension ordinance, the City Council had before it the petition and consent of Mrs. Snyder evidenced by the signature of Kelly affixed to the petition with the consent and authority of Mrs. Snyder. Expressed in terms of legal import and effect, the petition and consent was signed by Mrs. Snyder acting through Kelly, either as her agent or as a donee of a power executed by her and with authority to act for her in his own name. This fully and strictly meets the requirements of Paragraph 90, Section 1, Article V of the Cities and Villages Act.

Day v. Forest City Ry., 27 Ohio Cr. Ct. R. 60.

Simmons v. City of Toledo, 8 Ohio Cr. Ct. R. 535.

and see:

Springer v. Kroeschell, 161 Ill. 358, 364.

(d) The signature of Thomas McGrath. The title to the property signed for by McGrath passed to the City of Chicago prior to the passage of the extension ordinance. This stands on the same footing as any other city property, for which frontage consents need not be obtained.

(e) The signature of Anna Christian. At the time of signing the petition, Anna Christian was the legal owner of the lot, but was under contract to sell to Louis Beuerle. Afterwards, in pursuance of this contract, a deed was executed and delivered to Beuerle on September 2, 1915. The petition was signed by both Anna Christian and Louise Beuerle. If Beuerle had been in possession at the time of signing the petition, his signature alone would probably have been sufficient.

Ahern v. Board of Improvement District No. 3, 69 Ark. 68, 61 S. W. 575.

Day v. Forest City Ry. Co., 27 Ohio Cr. Ct. R. 60, (s. c. 73 O. St. 83, 76 N. E. 396).

At any rate, at the time the ordinance was passed, Beuerle had full legal and equitable title to the lot, and his signature being upon the petition, there can be no question about his consent.

We may add that under Paragraph 90, Section 1, Article V of the Cities and Villages Act, the City Council itself is vested with the determination of whether a petition authorizing it to grant the use of the street has been presented and whether such petition is sufficient.

“Acts of council in determining sufficiency of a petition for public improvement are *quasi* judicial in character, and its judgment upon sufficiency of petition, in absence of allegations of fraud, will not be inquired into by courts on application of a private person. *Kirchman v. West & South Towns St. Ry. Co.*, 58 A. 515; *Stewart v. Chicago General St. Ry. Co.*, 58 A. 446, *aff'd* 166-61; *North Chicago St. R. Co. v. Cheetham*, 58 A. 318; *Tibbetts v. West & South Town St. Ry. Co.*, 54 A. 180, *aff'd* 153-147.”

We are therefore of the opinion, that the objections of the Kenwood Residents' Association are untenable. Their opinion is merely a statement of abstract propositions of law which are not applicable to the facts submitted.

Yours very truly,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:
CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Payment of Minors' Wages to Parents.

July 28, 1916.

JOHN HEALEY, Esq., Paymaster.

Dear Sir:

In regard to your verbal request for an opinion as to whether or not you can make a legal payment of a minor's wages to his mother, would say that in the case of *Magee v. Magee*, 65 Ill. 255, the court has held the father is entitled to the wages of his minor son, unless such right has been voluntarily relinquished, or forfeited by some act on the part of the father. This rule is predicated upon the theory that during minority his father is under obligations to take care of, clothe and educate his minor son, and, in consideration thereof, he is entitled to receive whatever wages the son may earn during that period.

In the case of *Bradley v. Sattler*, 156 Ill. 603, the court, on page 608, says:

"We are satisfied that the rule founded upon natural justice and supported by the weight of modern authority, is, that upon the death of the father the mother becomes the head of the family, and is entitled to the services and earnings of her minor children."

In view of the above authorities, it would be necessary to ascertain whether the father has, by some voluntary act, forfeited his right to the earnings of his minor son before payment of such wages could be made, unless, of course, the mother be a widow. In that event, we are led to believe by the authorities that a widowed mother is entitled to the services and earnings of a minor child to the same extent as the father would be, if living.

Very truly yours,

WILBUR F. HARTMAN,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Disposal of Concealed Weapons.

July 28, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

We are in receipt of your letter of the 20th inst. in which you inquire:

“Will you kindly advise whether or not it is the duty of judges of the Municipal Court, when they confiscate a weapon, to turn same over to the custodian of this department, or whether the judges of the Municipal Court have the power to dispose as they see fit of weapons which they confiscate.”

We assume your inquiry relates to concealed weapons. Our interpretation of the ordinances is that the judges of the Municipal Court have the power to and it is their duty in case they adjudge that any person has violated the ordinance against carrying concealed weapons to order that the weapon or weapons shall be forfeited to and confiscated by the city. It seems to follow from this that the judges have no right to keep the weapons, but that they should pass to the possession of the city custodian to be disposed of by him as provided by law.

Chapter LXXXIII of The Chicago Code of 1911, Article 1, seems to cover this subject. The pertinent sections of the code are No. 2807 to No. 2812, both inclusive.

Section 2808 reads as follows:

“Any such weapon or weapons duly adjudged by any judge of the Municipal Court of said city to have been worn or carried by any person in violation of the first section of this article *shall be forfeited to and confiscated by the city as hereinafter provided.*”

And Section 2810 reads in part as follows:

“Upon the return of such summons or warrant such judge shall proceed to the hearing and determination of the matter, and if it shall be adjudged that such person has violated any of the provisions of this article *such judge shall so adjudge, and order that the weapon or weapons shall be forfeited to and confiscated by the city.*”

Perhaps a judge of the Municipal Court may, in a pending case, cause weapons to be impounded and held for use as evidence until the case is disposed of; but in that event when the case is disposed of we think the weapons would have to be returned to the person or persons to whom they belong. There would be no confiscation in such a case.

In our view, a judge of the Municipal Court may confiscate weapons only when authorized by law to do so and the law requires the judge in such case to—"order that the weapon or weapons shall be forfeited to and confiscated by the city."

It is possible that the trouble on this subject arises from not calling to the attention of the judges the ordinances to which we have above referred and having a proper order entered in each case.

We suggest that it might be well to take the matter up with Chief Justice Olson and present him our view of the subject, and perhaps we can procure a general order which will result in the ordinances being more strictly carried out.

Very truly yours,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Regulation of Tractors and Trailers.

August 7, 1916.

MR. J. A. DORIN, c/o Armour & Co., Union Stock Yards, Chicago, Illinois.

Dear Sir:

In reply to the letter of Armour & Company of July 19, 1916, asking an opinion on the question of whether or not the ordinance of the City Council entitled "An Ordinance for regulating the speed, capacity and dimensions of tractors and trailers using the public highway" (Proceedings of the City Council of May 17, 1915, page 271, *et seq.*) prohibits the

attaching of a trailer to an automobile truck, with the request that reply be addressed to you, I beg to say that in my opinion it does not, and that the question of trailers on automobile trucks is not included in such ordinance. In our view this ordinance, especially when read in connection with the ordinance relating to motor trucks, passed at the same time, and appearing on pages 270 and 271 of the Council Proceedings of May 17, 1915, relates to tractors which do not carry their own load.

The ordinance relating to motor trucks, above referred to, is entitled "An ordinance for regulating the speed, capacity and dimensions of motor trucks using the public highways," and, as before stated, is found in the Proceedings of the City Council of said date at pages 270 and 271, and Sections 2 and 8 thereof provide as follows:

"§2. For the purpose of this ordinance a motor truck shall be defined as a self-propelled vehicle commonly used for commercial purposes carrying its load as a single unit with non-detachable propelling power, equipped with tires of rubber or some material of equal resiliency."

"§8. It shall be unlawful for any motor truck to tow any other vehicle, unless such vehicle is accidentally disabled and in such case the connections between such motor truck and such vehicle shall not exceed sixteen feet in length."

I am, therefore, of the opinion that the use of trailers attached to auto trucks in the streets of this city is regulated by this latter ordinance and sections above quoted, and that this ordinance, reasonably interpreted, precludes the adoption of the use to the new method of trailers attached to auto trucks for the commercial purposes which you ask.

Very truly yours,

H. V. SHEPARD,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Revocation of Saloon Licenses.

August 7, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In answer to your inquiry of the 5th instant relative to the revocation of certain saloon licenses, we beg to say:

1. The question whether the Sunday closing law has been violated in a given case is a question of fact or, perhaps to speak more accurately, a mixed question of law and fact. Therefore, it is necessary to have an understanding of the rules governing such cases in order to determine whether or not there has been a violation in the particular case presented.

2. The statute relating to Sunday closing (Hurd's Revised Statutes 1915 and 1916, page 926) reads as follows:

"Whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not exceeding \$200."

It will be observed that the gist of the offense under this statute is the *keeping open* of a tippling house or place where liquor is sold or given away; that actual sales and gifts of liquor on Sunday are not essential to the offense; and further, that the law applies only to a "tippling house or place where liquor is sold or given away" which would not include the serving of liquor in a private residence not used for the purpose of carrying on the occupation of conducting a tippling house or place where liquor is sold or given away, assuming, of course, that such selling of liquor in a private residence is not done to evade the law.

3. Let us see what the Supreme and Appellate Courts have said on this subject:

(a) In the case of the *City of Bloomington v. Strehle*, 47 Ill. 72, there was before the court a city ordinance which, so far as material, was as follows:

"No person, shall keep open, or permit to be kept open, any saloon or place licensed under this ordinance
* * * on Sunday."

The Supreme Court, on page 73, said:

“The prohibition is, manifestly, confined to the occupation, not to the person. If the views of the counsel for the city be correct, then any private gentleman in the city, who shall give his guest a glass of wine or beer on Sunday, would be liable to the penalty. Such could not have been the intention of the legislature, and the language of the ordinance forbids such a construction.”

(b) In the case of *Koop v. People*, 47 Ill. 327, the Statute, as appears from the quotation from the opinion hereinafter made, was not exactly the same as our present Statute, but was substantially like it. The court went into the subject at considerable length and, beginning on page 329, said:

“Plaintiff’s counsel seem to be under the impression that it is essential to constitute the offense charged, that spirituous liquors should actually be sold in the saloon on the Sunday specified. This, we think, is an erroneous view of the statute. There is not one word in the branch of the statute on which this indictment is founded, making that a requisite. Section 127 of the statute makes criminal, open lewdness, or other notorious act of public indecency, tending to debauch the public morals—keeping open any tippling house on the Sabbath day or night, maintaining or keeping a lewd house, etc. It is classed under the head of offenses against the public morality, health and police, and to constitute it, the actual sale of liquors of any kind, on the Sabbath day or night, is not a requisite. The offense is in keeping a tippling house open on the Sabbath day or night.

“The proof, then, on the part of the prosecution, should be, that the defendant kept a tippling house, and that would be established by proof that he kept a grocery or drinking saloon, for the sale of strong drinks. ‘A tippling house’ is defined to be ‘a public drinking house.’ In such houses, the usual stimulating beverages are kept on sale. In this, beer only was sold. Beer was the defendant’s specialty. Some prefer one kind of ‘tipple,’ some another, and these houses are usually so furnished and kept as to accommodate the various tastes of their customers. There are tipplers of beer, as well as of other strong drinks, and the keeper of a beer saloon, when that alone is sold, is, in the light of our statute, the keeper of a tippling house.

“To establish the offense charged, it was only necessary for the prosecution to show that the defendant kept a beer saloon, where beer was sold by the glass or ‘drink’ that to this saloon the public had free access on the Sabbath day as on week days, and every facility afforded those who might enter to obtain their favorite ‘tipple.’ The proof in this case fulfills these requirements. The saloon was used as a sitting room for boarders at the house, and accessible to every one from the public street on the Sabbath, as on week days, and although proof was not required that the defendant should actually sell beer on that day, there was proof that beer was sold on the Sabbath day in the saloon. It makes no difference how much or how little he sold, or whether he sold any, and the fact that he sold one glass of beer goes to prove that the saloon was kept open for the purpose of selling it by the glass, and is a clear violation of the statute. By keeping open the saloon on the Sabbath day, the defendant showed his readiness and willingness to sell his liquors. He sold on that day all that was called for—one glass.

“It is not meet that the law should be evaded under the pretense that the saloon was defendant’s sitting room. It was also accessible to the public, and could readily become the resort of the idle and the vicious, and thus be productive of the evil consequences the statute was designed to prevent.”

(c) In the case of *Patten v. The City of Centralia*, 47 Ill. 370, the court, on page 371, said:

“Merely opening the door of a tippling house on Sunday would not constitute the offense aimed at by this ordinance. It must be kept open, as on week-days, for tippling purposes, and nothing of that kind was proved in the case.”

And, in *Fant v. The People*, 45 Ill. 259, the court, on page 262, said:

“Still, to keep open a tippling house, it was necessary as one of the ingredients of the offense, that liquors should be sold or drank.”

What the courts said in the two cases last cited should not be taken too literally but should be considered in the light of the decision in the subsequent case of *Kroer v. People*, 78 Ill. 294, to which we are about to call attention.

(d) In the case of *Kroer v. The People*, 78 Ill. 294, above cited, the court, beginning on page 297, used the following language:

“From the objections taken and urged in respect to the action of the court upon these instructions, it would seem to be the view of appellant’s counsel that, to make the offense under the statute of keeping open a tippling house on the Sabbath day, the house must be kept open in the same manner as on week days, and stress is laid upon the literal wording of an expression made use of in the opinion in the case of *Patten v. City of Centralia*, 47 Ill. 371, as countenancing such view. It was there said, in reference to such tippling house: ‘It must be kept open, as on week days, for tippling purposes.’ But the purport of that decision is mistaken, if it is supposed to be that the tippling house must be kept open in the same manner as on week days. The meaning was, that the object or purpose for which the house shall be kept open on Sundays shall be the same as on week days, *i. e.*, for tippling purposes.

“We understand that a tippling house will be kept open on the Sabbath day, within the meaning of the statute, where it is so kept that access may be had thereto on the Sabbath day, and facility afforded for the obtaining of intoxicating drinks. It is not necessary that the house should be kept open in all respects, its front door and its windows, as on week days. It is not material whether the entrance afforded be at the front door or at a back door; whether the door be kept open for admittance, or a closed door is opened for admission on application; or whether admittance be gained by a way known to the *general public or not*. It is sufficient that admittance be afforded to those who apply for admission, and that they are there accommodated with the beverages furnished at a tippling house.

“The instruction for the people may be open to criticism, as not being strictly accurate in saying, in effect, that, if any one person had free access to the defendant’s saloon, and bought and drank intoxicating liquors therein, there was a keeping open of the tippling house. That would be evidence from which to infer the saloon was kept open, but it might not, perhaps, properly be said, as matter of law, to be the keeping it open.

“But the evidence was, that, on different Sabbath days and nights, several persons at each time—although

they gained admission by a back way and door—were present together in defendant's saloon, drinking intoxicating liquors, and that the defendant was there behind the bar, selling and handing out the drinks. In view of the evidence in the case, we can not say that there was any material error in the instructions given on behalf of the people."

(e) In *Purefoy v. People*, 65 Ill. App. 167, the court, after quoting from the opinion in *Kroer v. The People*, *supra*, said, on page 170:

"Applying the principle to be deducted from the above quotation we think the evidence in this record fails to support the verdict. On neither of the occasions was the saloon opened for the purpose of dispensing drink. The mere fact that the witness obtained liquor there after he had gone in for another purpose is not enough. Nor is it material whether what he drank was in part pay for what he did, of which there is no proof. The offense charged is not the selling or giving of liquor in a tippling house on Sunday—but keeping open a tippling house on that day—that is, admitting persons there for the purpose of tippling.

"Here all that was done was to admit the witness for the purpose of doing certain work, and there is no reason to suppose that there was any intended evasion of the statute.

"There was no keeping open within the statute.
* * *."

4. We will now take up separately the cases as to which you have asked our opinion and give you our views in regard thereto in the light of the authorities to which we have called attention:

(a) "Frank Michaelko, 1900 W. 21st st., 10 a. m. 4 men not his employes *in rear room of saloon* drinking beer; 1 man carrying 5 bottles of beer out of kitchen in rear."

It seems to us, from the facts stated, it is a fair inference that Mr. Michaelko was keeping open his place on Sunday, July 30, assuming that he conducts a saloon at the address given. You will observe that there is no express statement as to whether or not he was conducting a saloon at such place.

(b) "At 11 p. m. officers found six men in flat above saloon conducted by Ignatz Wachocoski, 1444 W. Erie st. There were 6 or 7 cases of beer, a jug of whiskey and some bottled goods. Detected two of the men drinking bottle beer."

We point out that it does not appear from that statement who occupied the flat above the saloon, or where the liquor which was in the flat came from, or any other circumstance except that the flat was above a saloon; that there was some liquor there; that two men were drinking some beer; that the saloon under the flat was conducted by Ignatz Wachocoski, and the recommendation is that license No. 5453 issued to John Prontek be revoked.

In our opinion, the evidence in this case is insufficient to warrant a revocation of the license.

(c) "James A. Wallace, Jr., 3801 Union Ave., at 7:10 a. m. 4 men entered rear entrance of living rooms and 8 came out. First 3, then 3 more, and a few minutes later the other 2 came out alone."

All this report purports to show is that some men entered and came out of the living rooms of Mr. Wallace. There is nothing to show that their entering and coming out had anything to do with the saloon conducted by him. Therefore, we think the evidence in this case is insufficient.

(d) "About 5:10 this p. m. (July 30) Detective Sergeants Maurice Wall and James Deasey of this precinct found 6 men drinking beer in living rooms in rear of saloon owned by Albert Schmidt at 1658 W. 51st st. Entrance was gained through rear door by the above-named sergeants."

This statement appears to us to be incomplete. Were the living rooms connected with the saloon? If so, was the door between the living rooms and the saloon open or closed or locked? What, if any, evidence was there that the beer being drunk in the living rooms came from the saloon. This statement, in our opinion, should be supplemented by evidence showing that the use of the rear room in reality was a subterfuge by which the saloon was actually kept open.

(e) "About 5:15 this p. m. (July 30) Detective Sergeants Maurice Wall and James Deasey of this precinct found 11 men drinking beer in living rooms in rear of saloon owned by Elias Swierski at 5201 S. Hermitage ave. Entrance was gained through side door by the above-named sergeants."

Our observations under paragraph (d) apply also to this paragraph (e).

Respectfully submitted,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Vacation of Earl's Subdivision.

August 14, 1916.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

On May 1, 1914, this department rendered you an opinion as to the validity of an instrument purporting to vacate Earl's Subdivision of lots one and four (except the west 297 feet of lot one and the west 297 feet of the north 66 feet of lot four in Conrad Seipp's Subdivision of the west half of the Northwest quarter of Section 25, Township 38 North, Range 14, East of the 3rd P. M.), a copy of which is as follows:

"May 1, 1914.

John D. Riley, Esq.,
Superintendent of Maps,
Dear Sir:

In answer to your communication of the 28th inst., with reference to the validity of an instrument purporting to vacate Earl's Subdivision of lots one and four (except the west 297 feet of lot one and the west 297 feet of north 66 feet of lot four in Seipp's Subdivision of the west half of the Northwest quarter of Section 25, Township 38 North, Range 14, E., etc., I wish to say that from an examination of the plat attached, I am of

the opinion that said alleged act of vacation is ineffective and void as to all streets and alleys shown on said plat.

Unless, therefore, permanent improvements have been permitted to be placed upon any streets or alleys, the city may now claim its rights therein.

Very truly yours,

NICHOLAS MICHELS,
Assistant Corporation Counsel.

Approved:

WM. H. SEXTON,
Corporation Counsel."

Since the rendering of that opinion the matter was again brought up before this department, at the request of Hon. Edward J. Glackin, Secretary, Board of Local Improvements, for an opinion as to the validity of said instrument, and upon careful investigation this department on April 19, 1916, rendered to him the following opinion:

"CITY OF CHICAGO
DEPARTMENT OF LAW

April 19, 1916.

Hon. Edward J. Glackin,
Secretary, Board of Local Improvements.

Dear Sir:

"Replying to your communication in reference to widening West 71st street, etc., and your inquiry as to the validity of the vacation instrument filed of record October 2, 1889, as Document No. 1164375, we beg to inform you that we have made an investigation with reference to the purported dedication by said plat, and whether said vacation instrument is valid would depend entirely upon the question as to whether Earl's Subdivision was a statutory dedication.

"Conrad Seipp's Subdivision of the West Half (W. $\frac{1}{2}$) of the Northwest quarter (N. W. $\frac{1}{4}$) of which Earl's Subdivision is a part, was dedicated and filed of record October 23, 1867.

"On July 4, 1876, George Earl, purporting to be the owner of Lots One (1) and Four (4) excepting the west two hundred ninety-seven (297) feet of Lot One (1) and the west two hundred ninety-seven (297) feet of the north sixty-six (66) feet of Lot Four (4) in Conrad Seipp's Subdivision, filed a plat of record of Earl's Subdivision, in which plat Ridgeland avenue from 71st street to the center of the block, south, is shown to be thirty-seven and nine-tenths (37.9) feet wide and from the corner of

block south to 72nd street sixty-six (66) feet wide. A sixteen (16) foot alley is also shown from 71st street to 72nd street, and a thirty-three (33) foot street from 71st street to 72nd street, in that portion of said Earl's Subdivision which you stated in your letter is now claimed to be Cregier avenue.

"On June 12, 1872, George W. Perry, and wife, conveyed by warranty deed to George Earl the undivided quarter ($\frac{1}{4}$) to Sam. M. Spelding, the undivided half ($\frac{1}{2}$) and to Henry F. Oliver the undivided Quarter ($\frac{1}{4}$) of Lots One (1) and Four (4) in Conrad Seipp's Subdivision, as described in the alleged Earl's Subdivision.

"Earl's Subdivision was filed of record on July 14, 1876, and was acknowledged by George Earl as the owner, which acknowledgment was not in accordance with the statute in such cases made and provided. Samuel M. Spelding and Henry F. Oliver did not join in said dedication instrument as owners.

"On July 6, 1879, Henry F. Oliver conveyed his instrument in Lots One (1) and Four (4) in Conrad Seipp's Subdivision to G. Albert Fellows.

"The records do not show that any lots have ever been sold therein that were described as being in Earl's Subdivision and it does not appear that the city has ever accepted any of the streets or alleys therein, even had there been a valid dedication of said subdivision.

"The statute provides that the plat of a subdivision shall be acknowledged by the owner of lands in the same manner as deeds of lands are required to be acknowledged. At the time of the dedication, George Earl only owned the undivided Quarter ($\frac{1}{4}$) of said property, and furthermore, the plat was not acknowledged as required by statute. Consequently, the subdivision was not a statutory dedication, and as Henry F. Oliver conveyed to G. Albert Fellows his undivided Quarter ($\frac{1}{4}$) of said lots One (1) and Four (4) on July 6, 1879, three years after the filing of said plat of record, such conveyance would clearly indicate that Henry F. Oliver did not manifest any intention to set apart for public use the strip of land designated as streets and alleys in said alleged subdivision, nor were we able to find any evidence that Sam. M. Spelding, who owned the undivided Half ($\frac{1}{2}$) of Lots One (1) and Four (4) manifested any intention to set aside said streets for public purposes, nor is there any indication that the public has ever enjoyed the use of said streets in such manner and for such time as would indicate on the part of all the owners that it was their inten-

tion to set apart the streets and alleys in said subdivision for the use of the public.

"A primary condition of every valid dedication is that is shall be made by the owner of the fee. (*Bangam v. Mann*, 59 Ill. 492; *Smith v. Young*, 16 Ill. 169.)

"We are informed that Earl's Subdivision of Lots One (1) and Four (4) in Conrad Seipp's Subdivision has been fenced in and a club house has been erected on Ridgeland avenue by the owners thereof and has so remained for the past twenty years, which, even if it could be shown that the city had an easement in said streets and alleys, it would be presumed that the city had abandoned the same. As the owners thereof have constructed lasting and valid improvements on Ridgeland avenue and the city has acquiesced therein, the city would be stopped from exercising its rights, if it had any.

"Our courts have held that the owner of the fee of land, over which the public has an easement, may extinguish the easement by an open, exclusive, uninterrupted and adverse possession where such a possession is acquiesced in by the public for such a time as to raise a fair presumption of an abandonment. (56 Ill. 545; 58 Ill. 380; 159 Ill. 105; 119 Ill. 251.)

"We are, therefore, of the opinion that Earl's Subdivision of Lots One (1) and Four (4) in Conrad Seipp's Subdivision, etc., has never been legally dedicated and as there was no legal dedication the vacation instrument would have no effect other than to show the intention on behalf of George Earl as part owner of said Lots One (1) and Four (4) in Conrad Seipp's Subdivision to revoke or withdraw the dedication of Earl's Subdivision in so far as it affects his interest and that the city has no right, title or interest in said alleged streets and alleys in said Earl's Subdivision.

"Following this opinion, it will be necessary for you to include in the condemnation proceedings for the widening of 71st street, the north twenty-two (22) feet of Ridgeland avenue, the north twenty-two (22) feet of the sixteen (16) foot alley east of Ridgeland avenue and the north twenty-two (22) feet of what is known, or claimed as Creiger avenue.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel."

We submit the above to you so that your department may be governed in all actions with reference to said subdivision in the future.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Lighting Fixtures for Railroad Subway Abutments.

August 17, 1916.

HON. WM. G. KEITH, Commissioner of Electricity.

Dear Sir:

We are in receipt of your communication of the 9th inst., enclosing copies of an agreement between The New York Central Railroad Company and the City of Chicago, in regard to attaching lighting fixtures to the railroad subway abutments.

The agreement authorizes the city to attach electric light fixtures to the railroad company's abutments at 31st street, South Park avenue and 76th street, and further provides that the city shall indemnify and save harmless the railroad company from and against all damages which the company may sustain as a result of the construction, maintenance or removal of such fixtures.

We have been unable to find that the commissioner of electricity has been given authority to enter into a contract containing provisions of this character. We believe, therefore, that if a clause indemnifying the railroad company is essential to the agreement, a council order authorizing such contract should first be obtained.

City of Chicago v. Fraser, 60 Ill. App. 404.

2 Dillon on Mun Corp., Section 775.

We are in some doubt, also, whether the New York Central Railroad Co. may properly enter into an agreement with ref-

erence to attaching lighting fixtures at the points mentioned. We understand that the Lake Shore & Michigan Southern Railroad Company, the Michigan Central Railroad Company and the Nickel Plate Road are subsidiary companies of the New York Central Railroad Company, but we have been unable to learn that the latter is the actual owner of any railroad right-of-way or other railroad property in this city. If this is the case, it would seem that this company is not the proper one to execute an agreement such as the one under consideration.

A further objection to the agreement as submitted to us may be taken to Paragraph 5, relative to the State Public Utilities Commission. In view of the attitude of this city in reference to the jurisdiction of the State Public Utilities Commission over public utilities operating here, we are not in favor of a clause of this kind being inserted in the contract.

Yours very truly,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Warrants in Anticipation of Taxes.

August 17, 1916.

HON. CHARLES SERGEL, City Treasurer.

Dear Sir:

We are in receipt of your oral request for an opinion as to the validity of an ordinance passed March 25, 1916, and appearing on page 3985 of the Printed Journal of the Proceedings of the City Council of said date; said ordinance being as follows:

“Section 1. That, whereas, there is not sufficient money in the treasury of the city to meet and defray the ordinary and necessary expenses of said city, therefore, the mayor and city comptroller be and they are hereby authorized to issue warrants against and in anticipation of the taxes levied by the City of Chicago for

the corporate purposes of said city for the year 1916, to an amount not to exceed seventy-five (75) per cent of the total amount of the tax levy for the year 1916 for said purposes, such warrants to be issued only in conformity with Section 2 of an act of the General Assembly of the State of Illinois, entitled 'An Act to provide for the manner of issuing warrants upon the treasurer of the state or of any county, township, city, village or other municipal corporation and jurors' certificates,' approved June 27, 1913, in force July 1, 1913. Said mayor and city comptroller are further authorized to attach thereto interest coupons for interest thereon at the rate of not exceeding five (5) per cent per annum, payable only out of the taxes against which they shall be drawn when collected.

"Section 2. That said mayor and city comptroller be and they are hereby authorized and empowered to pay said interest coupons so issued at or after maturity out of the specific funds therein specified, or out of any funds then in the city treasury not otherwise appropriated.

"Section 3. This ordinance shall take effect and be in force from and after its passage and approval."

In reply we beg to advise you that Section 2 of an act authorizing municipal corporations to issue anticipation warrants, appearing on page 2689, Hurd's Revised Statutes of the State of Illinois, 1915-16, provides as follows:

"§2. That whenever there is not sufficient money in the treasury of any county, city, town, village or other municipal corporation to meet and defray the ordinary and necessary expenses thereof, including all expenses for building purposes, it shall be lawful for the proper authorities thereof to provide a fund to meet all said expenses by issuing and disposing of warrants drawn against and in anticipation of any taxes already levied by said authorities for the payment of all such ordinary and necessary expenses of such county, city, town, village or other municipal corporation, to the extent of seventy-five per centum of the total amount of any such tax levied: *Provided, however,* that warrants drawn and issued under the provisions of this section shall show upon their face that they are payable solely from said taxes when collected and not otherwise, and shall be received by any collector of taxes in payment of the taxes against

which they are issued, and which taxes against which said warrants are drawn, shall be set apart and held for their payment."

Section 9 of "An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities having a population exceeding two hundred thousand inhabitants" (approved June 29, 1915, in force July 1, 1915) appearing on page 433, Hurd's Revised Statutes of the State of Illinois, 1915-16, provides in part as follows:

"It shall be lawful for any such city to levy a tax of not more than seven-tenths of a mill on the dollar for a period of three years beginning with the year 1915 on all taxable property of such city in such sum as will, when added to the deductions from the salary or wages of policemen and receipts available from other sources, as hereinbefore referred to, amount to sufficient income to meet the actual requirements above referred to and designated (A), (B) and (C). Said taxes shall be levied and collected in like manner with the general taxes of such city and the fund arising therefrom shall be known as 'Police Pension Fund'; which said tax shall be in addition to all other taxes which such city is now or hereafter may be authorized to levy upon the aggregate valuation of all property within such city, and the county clerk of the county in which such city is located in reducing tax levies under the provisions of an act entitled 'An Act concerning the levy and extension of taxes, approved May 9, 1901, in force July 1, 1901,' as subsequently amended, shall not consider the tax for said Police Pension Fund authorized by this act as a part of the general tax levy for city purposes, and shall not include the same in the limitation of three (3) per cent of the assessed valuation upon which taxes are required to be extended."

Section 1 of "An Act to revise the law creating a firemen's pension fund in cities, villages and incorporated towns whose population exceeds five thousand inhabitants" (approved June 29, 1915, in force July 1, 1915), appearing on page 436, Hurd's Revised Statutes of the State of Illinois, 1915-1916, provides in part as follows:

"That in all cities, villages or incorporated towns whose population exceeds five thousand (5,000), having a

paid fire department, the City Council or the Board of Trustees, as the case may be, shall have the power to levy a tax for a period of three years beginning with the year 1915, not to exceed three-tenths of a mill on the dollar on all taxable property of such city, village or incorporated town. Such tax to be levied and collected in like manner with the general taxes of such city, village or incorporated town, which said tax should (shall) be in addition to all other taxes which such city, village or incorporated town is now or hereafter may be authorized to levy upon the aggregate valuation of all property within such city, village or incorporated town, and the county clerk in reducing tax levies under the provisions of Section 2 of an act entitled, 'An Act to amend Section 2 of an Act entitled, An Act concerning the levy and extension of taxes, approved May 9, 1901, in force July 1, 1901, as amended by an Act approved March 29, 1905, in force July 1, 1905, as amended by an Act approved June 14, 1909, in force July 1, 1909, as subsequently amended, shall not consider the tax herein authorized as part of the general taxes levied for such city, village or incorporated town purposes and shall not include same in the limitation of three per cent of the assessed valuation upon which taxes are required to be extended."

The City Council of the City of Chicago by virtue of the power conferred upon it by the foregoing sections of the statute, relating to the Police and Firemen's Pension Funds, in the annual appropriation bill for the year 1916 adopted by the City Council on March 6th of said year, appropriated for the Police Pension Fund the amount "provided to be levied and collected under the provisions of an act of the General Assembly, approved June 29, 1915, entitled, An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities having a population exceeding two hundred thousand inhabitants" and for the Firemen's Pension Fund "the amounts provided to be levied, collected and paid under the provisions of an act of the General Assembly, approved June 29, 1915, regarding Firemen's Pension Funds in cities having a population exceeding five thousand inhabitants."

From an examination of the Police Pension Fund Act, as

well as the Firemen's Pension Fund Act, adopted by the General Assembly of the State of Illinois, in force and effect July 1, 1915, the City Council in cities and the Board of Trustees in villages and towns were authorized and empowered to levy a tax not exceeding seven-tenths of a mill for the Police Pension Fund and not exceeding three-tenths of a mill for the Firemen's Pension Fund, to be levied and collected the same as other taxes for corporate purposes. Seven-tenths of a mill would amount to the sum of Seven Hundred Thousand Dollars and three-tenths of a mill would amount to the sum of Three Hundred Thousand Dollars, and the tax levy adopted by the City Council on March 25, 1916, appropriating \$46,230,397.39, provided that \$700,000 should be levied for the Police Pension Fund and the sum of \$300,000 for the Firemen's Pension Fund.

We are of the opinion that the language used in the appropriation ordinance for the year 1916 clearly indicates that the City Council intended and it appropriated the maximum amount allowed by law to be appropriated, both for the Police Pension Fund and the Firemen's Pension Fund, and that the maximum amount allowed to be levied for the Police Pension Fund was \$700,000 and for the Firemen's Pension Fund \$300,000 and the tax levy ordinance for the year 1916, passed a few weeks after the appropriation ordinance, contains the provision that the sum of \$700,000 shall be levied as taxes and collected for the benefit of the Police Pension Fund and the further sum of \$300,000 shall be levied as taxes and collected for the benefit of the Firemen's Pension Fund. We are of the opinion that a valid and legal appropriation of both these amounts was made by the City Council on March 6, 1916, prior to the tax levy ordinance being adopted by the City Council.

In view of the fact that the General Assembly has authorized the issuance of tax anticipation warrants for the benefit of municipal corporations when their financial condition necessitates the issuance of same, and the Board of Trustees of the Police Pension Fund having represented to you that it is necessary for tax anticipation warrants to issue

in order that revenue enough may be obtained by them to meet the monthly pension pay roll, we beg to inform you that the issuance of tax anticipation warrants for the benefit of the police and firemen's pension funds at the present time would be valid and legal, and that all the requirements of the law necessary to be complied with in order to establish the validity of the tax anticipation warrants in question have been complied with by the City Council of the City of Chicago, and the Board of Trustees of the Police Pension Fund and Firemen's Pension Fund respectively.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Withdrawal of Special Assessment at Tax Sale.

August 22, 1916.

HON. MACLAY HOYNE, State's Attorney.

Dear Sir:

Under date of August 8, 1916, your Mr. Bliss, assistant state's attorney, forwarded to us a copy of a letter from the recorder of Cook County dated December 17, 1915, in which the latter asks certain questions concerning special assessments withdrawn by the City of Chicago while the sale of delinquent property was in progress, and he states that this is a matter of special interest to the city and requests an opinion on the points covered in the recorder's letter.

The case is presented and the questions are asked in the following language:

"A special assessment in the City of Chicago levied, confirmed and certified to the city collector for collection in the regular way. City collector while books were in his possession received no payment on certain properties assessed under said assessment and returned same to county collector. County collector obtained judgment for sale in July Term (tax still unpaid) and offered for sale

for said special and no bid or bids were made for said special assessment. The City of Chicago withdrew said special assessment from said county collector. Has the City of Chicago the right to withdraw without vacating judgment of sale? If judgment is not set aside who would be the proper official to collect and receipt therefor, and if failure to collect, could same be returned delinquent in the following year and could county collector sell under first judgment or would it be necessary to take another judgment, and what penalty, if any, can be asked?"

The first question asked is whether the City of Chicago has the right to withdraw a special assessment from the county collector without vacating the judgment of sale. This question assumes that the city, in withdrawing the property from sale, withdraws it from the county collector. It is not intended that this should be done. The withdrawal by the city simply amounts to deferring the execution of the judgment authorizing the sale. It is similar in effect to a direction to the sheriff holding an ordinary execution that he should not make a sale of the property seized.

It goes without saying that neither the city nor any court can vacate a judgment after the term goes by if there has been no appeal or other proceedings to preserve jurisdiction, and therefore we apprehend that the real question raised is whether the city has the right to withdraw such special assessment from sale after the matter has gone so far.

The city is authorized by Section 72 of the Local Improvement Act to purchase property at a tax sale, in default of other bidders, for the purpose of enabling it to enforce collection of special assessments levied thereon by the municipality. It is not obliged to do so. If it fails to bid and allows the assessment to stand against the property, then, under Section 203 of the Revenue Act, the property is forfeited to the state.

It has been intimated that there is some doubt concerning the forfeiture, because Section 203 makes no mention of special assessments and only provides that the tract or lot offered at the tax sale and not sold for want of bidders should be forfeited. Our Supreme Court has held that although Sec-

tion 292 of the Revenue Act defines the word tax so as to include a special assessment, nevertheless the act mentions special assessments as distinguished from taxes in so many places that a special assessment should not be regarded as a tax in construing certain of the provisions relating to taxes. (*Hosmer v. Hunt Drainage District*, 134 Ill. 317.) Hence, the question has arisen whether there would be a forfeiture if only the special assessment was involved. We are convinced, however, that Section 203 contemplates a forfeiture in such cases, not only because it immediately follows and refers to Section 202, which includes special assessments when it provides for the purchase at tax sale and the penalty, but there is a direct reference in Section 211 to real estate again sold for taxes or forfeited to the state after it has been purchased at a tax sale which seems to be conclusive on this point.

Prior to the enactment of the amendment to Section 56 of the Local Improvement Act in 1915 the city had no lien by virtue of any special assessment which remained unpaid. It was in precisely the same position as all other tax buyers. (*O'Connell v. Sanford*, 256 Ill. 62.) If it bought at the tax sale, the property was incumbered to the extent that the tax certificate incumbered it, but the special assessment was presumed to be paid by the city as the buyer. In the same way in case of forfeiture to a certain extent there was an extinguishment of the assessment and the city ran the risk of sacrificing its interest if it allowed it to go to forfeiture. It is true that the statute made provision for payment to the city in case enough was realized, but it did not make it incumbent on the county collector to protect the rights of the city. The only thing that could be done by the city to protect its interests was either to buy at the original sale or at a sale subsequent to forfeiture or to institute suit against the owner in an action for debt.

Nevertheless, there must have existed even at that time the right to withdraw the assessment from sale, otherwise the provisions of Section 60 of the Local Improvement Act would have been entirely nugatory. This section authorizes the City Council, within five years after the confirmation of the orig-

inal assessment, if the property is delinquent and no court has set aside the judgment of sale, to levy a new assessment. (*City of Taylorville v. Johnson*, 242 Ill. 175; *City of Casey v. C. H. & D. R. Co.*, 263 Ill. 352.) This would not have been possible if the city was bound to permit a forfeiture whenever it failed to bid. Consequently, even under the old law the city undoubtedly had a right to withdraw the property from the sale if only for the purpose of levying a new assessment.

Approaching the question from another angle, we find that by Section 279 of the Revenue Act a special assessment is not barred until the second year after it is levied. In other words, if the city saw fit not to make a return of the special assessment until the following year it had the right, even under the law as it stood prior to 1915 and it has the right at the present time to withhold the assessment until the second year. Hence, for one year the power was always vested in the city to withdraw a special assessment from sale, and even from collection, and we see no reason for assuming that the power or right to withdraw from sale was at any time taken away merely because judgment was entered. It may be that withdrawal from collection after judgment would have amounted to a waiver of judgment, but we do not believe that the city is concerned with that because that has not in fact been done. The recorder in such an event might be uncertain as to what status the property is in when he makes abstracts, but it is at best only a moot question.

The amendment of Section 56 of the Local Improvement Act put the city in much better position in regard to its rights under the judgment of sale. By that amendment a lien is created in favor of the municipality instead of the state, and this lien continues indefinitely until the judgment rendered against the property in the special assessment proceeding is paid. The result of this new law is that when the assessment is once fixed the city has the right to pursue its remedy by an application for a sale from year to year on the original judgment if there is no sale the first year. This can only be done by withdrawing the assessment from sale in case there are no bidders, because otherwise the property would be forfeited to the state.

With this in view the county collector acting for the city has re-advertised this year at least a part of the withdrawals of last year, stating in the notice that the sale would be on account of the judgment entered in 1915. The withdrawal of such assessments from the 1915 sale merely had the effect of deferring action while the lien of the city for the assessments remained undisturbed. The county collector retained same for collection as the agent of the city and it is incumbent on him to take such action in the future as the city desires and the law will permit. Under such conditions it would be the duty of the county collector to advertise a sale of such delinquent property either at the next annual sale or at such other times as he is directed to do so by the city.

As to this position we rely on the recent case of *People ex rel. Matter v. Chicago Title & Trust Co.*, 270 Ill. 591, in which the following language is used by the court:

“The owners of the lands against which judgments have been rendered and orders of sale entered have had their day in court, and are no longer entitled to litigate the question of the validity of the taxes or special assessments or to question in any way the validity of such judgment and order of sale. Nothing remains to be done except to give a proper notice of the time and place when and where the lands involved will be sold to satisfy the delinquent taxes or special assessments. While it is the duty of the county collector to give such notice when he next gives notice of his intended application for judgment and order of sale for delinquent taxes and special assessments, if for any reason he fails to give such notice at that time it may be given any year thereafter when notice is given of his intended application for judgment and order of sale for delinquent taxes and special assessments. Had the collector in this instance given the proper notice nothing would have remained to be done except to offer the land for sale upon the date advertised. The collector did not follow the procedure indicated in *Boyn-ton v. People, supra*, but gave the usual notice that he would apply for judgment and order of sale. This was not a sufficient notice to warrant him to expose for sale lands which were liable to be sold under a judgment and order of sale formerly obtained.”

The next question of the recorder relates to the proper official to collect and receipt for a special assessment which has been withdrawn. This question is already answered. The collection never having been withdrawn from the county collector, he is bound to collect and receipt for same when payment is offered. We understand that this has been the practice, and that when payment was tendered after the books were turned in to the county clerk the county collector would obtain a bill in the county clerk's office and receipt same upon payment being made.

We do not believe there is anything in the law which would prevent the county collector from proceeding under Section 229 of the Revenue Act when the time for a second sale arrives. That section provides the method of a new sale after forfeiture. The amount due under the former judgment, under this procedure, could be added to the taxes and special assessments of the current year. Care should be taken in such event to provide against a duplication of judgments, but if the record in the subsequent proceedings shows that there is included in the new judgment the judgment or judgments rendered in former proceedings there could be no doubt as to its validity. If new judgment is taken the costs of the former proceedings and interest on the judgment are properly included.

The last question asked relates to the penalty. There having been no sale under the first judgment, no penalty could attach, but such penalty can be added at a subsequent sale whether made in pursuance of the first judgment or a subsequent judgment.

Inasmuch as there is no adjudicated case which passes on the propriety of entering a second judgment under authority of Section 229 of the Revenue Act, we believe the safer procedure for the present would be to do what the county collector has actually done this year—advertise the property for sale in pursuance of the original judgment. We have no doubt, however, that it is only a question of time when matters will arise which will make it necessary to secure a second

judgment in some cases, and then the procedure outlined in Section 229 should be followed.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Grocery Store in Residential Neighborhood.

August 25, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.
Dear Sir:

Under date of August 19, 1916, you request that the corporation counsel submit an opinion as to the legal status of a grocery store now in operation at No. 2127 DeKalb street in a strictly residential district contrary to a city ordinance which is as follows:

“It shall be unlawful for any person, firm or corporation to carry on the business of selling meats, poultry, fish, butter, cheese, lard, vegetables or any other provisions from any place of business located in any block in which all the other buildings are used exclusively for residence purposes, without first securing and filing with the city clerk of the City of Chicago a written consent of three-fourths of the property owners according to frontage on both sides of the street in the block in which the building to be thus used is located, provided, in determining whether all the buildings in said block are used exclusively for residence purposes, any building fronting on another street and located upon a corner shall not be considered.”

Said ordinance was passed by the City Council May 18, 1914, subsequent to a decision by the Supreme Court in the case of *People ex rel. Julius Friend v. City of Chicago*, 261 Ill. 16, declaring invalid a somewhat similar ordinance in the following language:

“It shall be unlawful for any person, firm or corporation to locate, build or construct any store for the sale

at retail of goods, wares and merchandise on any street in any block in which all of the buildings are used exclusively for residence purposes without first securing and filing with the commissioner of buildings the written consent of a majority of the property owners according to frontage on both sides of the streets in the block in which the building to be thus used is located; provided, in determining whether all the buildings in said block are used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered."

The City of Chicago is organized under the Cities and Villages Act and it has therefore only such powers as are therein delegated or necessarily implied, and in reference to the matter in question it derives such power under Clause 50, Section 1, Article V, which is as follows:

"To regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables and all other provisions and to provide for place and manner of selling same."

In the case of *People ex rel. Friend v. City of Chicago*, *supra*, the Supreme Court held that ordinance invalid because there was nothing in the statute giving the municipality control over "retail stores" as set out in said ordinance.

The court further said, after enumerating several clauses of the Cities and Villages Act, including Clause 50, Section 1, Article V,—

"A careful reading of the foregoing clauses will show that all the subjects which are enumerated are of such a character that either they are necessarily detrimental to the comfort and well-being of persons who are required to reside near them or may become so when improperly and carelessly carried on. Retail stores, other than groceries and meat markets, are not included in the occupations enumerated in the statute."

The Supreme Court, therefore, in accordance with that proposition of law, declared the ordinance invalid. The City Council, subsequent to said decision, enacted the present existing ordinance, as previously set out, and in doing so strictly followed the wording and language of said Clause 50, Section 1, Article V of the Cities and Villages Act.

In the case of *People ex rel. Busching v. Henry Ericsson*, 263 Ill. 368, the Supreme Court, in passing upon the validity of a somewhat similar ordinance to the one in question (the only difference being that the regulation pertained to garages instead of grocery stores) said:

“In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended and that there is some connection between the provisions of the law and such purpose. The power of the Legislature to regulate such a business is in no way dependent upon the question whether it is a nuisance *per se*. It is of such a character that it becomes a nuisance when conducted in particular localities and under certain conditions, and it is clearly within the provisions of the Legislature in the exercise of the police power to authorize the municipalities of the state to direct the location of public garages.”

And on page 374, the court further said:

“The city undoubtedly has the power, if it should see fit to prohibit the location of a garage in a strictly residential district and it necessarily follows that an ordinance permitting the location and maintenance of a garage in residential districts under the conditions prescribed by this ordinance cannot be said to be unreasonable. The requirement that the person desiring to construct or maintain a garage in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residences or procure the written consent of a majority of the property owners according to frontage on both sides of the street, is not unreasonable.”

Under the same reasoning, a grocery store may become a nuisance by carelessly conducting it, and an ordinance requiring the consent of three-fourths of the property owners according to the frontage on both sides of the street where the building is located, is not unreasonable.

For the reasons above stated, I am clearly of the opinion that the proprietor of said store at No. 2127 De Kalb street must procure the necessary frontage consents to conduct his store according to said ordinance; and I am of the further opinion that any person violating this ordinance is subject to the penalty prescribed under Section 720 of The Chicago Code of 1911, and should be summoned into court accordingly. If, after judgment has been entered against any person so violating said ordinance, there is a continuation of said offense the police have the power to enforce the provisions of said ordinance by closing up said store.

Very truly yours,

GEORGE KANDLIK,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Execution of Instruments Requiring Signature of Mayor.

August 29, 1916.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

In response to your request for information concerning the ordinance relating to the mayor's signing of written instruments by deputy, we beg leave to advise you that on February 8, 1915 (Council Journal p. 3178), the following ordinance was passed:

“Section 1. That in all cases where the ordinances of the city require that the signature of the mayor shall be attached to any license, permit, contract, local improvement bond, or other written instrument, and in all cases where said ordinances require the mayor's approval in writing or endorsement in writing, the mayor may, in his discretion, and in such manner as he sees fit, affix his signature or cause his signature to be affixed by means of a rubber stamp or by printing, or cause it to be signed by his secretary or other person duly authorized by the mayor to sign in his stead.

“Section 2. This ordinance shall take effect and be in force from and after its passage and approval.”

The above ordinance did not include municipal bonds other than local improvement bonds within its terms, for the reason that there were a large number of bonds to be issued under ordinances previously passed which expressly required the signature of the mayor, and for the further reason that it was deemed advisable to prescribe the precise form of the bond in each ordinance authorizing an issue.

The matter was then taken up by the writer with Messrs. Wood & Oakley, the firm that is regarded generally by buyers of bonds as the best authority on the subject. These gentlemen admitted that there was nothing in the law which prevented the designation of another officer as the proper person to sign bonds, but they strongly advised against such a course. They said that so far as local improvement bonds were concerned their standing would not be seriously affected if signed by another elective officer—the treasurer being suggested by them—but that as far as the regular municipal bond issues were concerned, the omission of the signature of the chief executive officer of the city would detract from their salability and perhaps from their market value. As a result of this expression of opinion, while the above ordinance was never repealed, it became a dead letter.

We attach hereto a copy of memorandum made by the writer for the corporation counsel covering the same subject matter as this letter.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Definition of Hospital Under Code.

August 29, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

In your letter of the 28th ult. you ask—

“Will you kindly define as per Section 265 what now constitutes a hospital? This section has been amended and at present does not define a hospital; therefore, this department is at a loss to know in taking up matter as pertaining to distances of garages, etc., from a hospital, as to what constitutes a hospital. We are, therefore, desirous of having you define a hospital as per Section 265 of the Revised Building Ordinances.”

The section to which you refer is found at page 84 of The Chicago Code of 1911 and is as follows:

“265. FRONTAGE CONSENTS FOR HOSPITALS.) It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said block. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for the building or constructing, or a license be issued for the maintaining, conducting or managing of any such hospital.”

Ordinances governing the location and licensing of public garages in the City of Chicago were passed by the City Council July 17, 1911, found at pages 961, 962 and 963 of the Journal of the Proceedings of the City Council, which ordinances also repealed Section 716 of The Chicago Code of 1911 under Article XXIV on Frontage Consents and Section 2684 of said code, Article VIII on Garages, which repealed sec-

tions had previously governed the location and licensing of garages.

The rules, therefore, governing the location and licensing of public garages in the City of Chicago are found in the two ordinances first above mentioned. For the purpose of this opinion we quote only from Section 1 of the first ordinance which governs the location of public garages, as the language of Section 1 of the second ordinance governing the licensing of public garages is identical therewith. The terms then, of this ordinance, on the point in question are as follows:

“It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage within 200 feet of any building used as and for a hospital, church or public or parochial school, or the grounds thereof, * * *.”

We assume from your letter that you wish the term “hospital” as used in the above section, as well as in said Section 265 to which you refer, defined.

We are of the opinion that the term “hospital” as used in said Section 265 and elsewhere in the ordinances of the city, means such an institution or place as is defined by Section 1213 of The Chicago Code of 1911 in Article IX, on Hospitals, and as has been recognized and licensed as a hospital. The language of said Section 1213 is as follows:

“1213. HOSPITAL DEFINED.) For the purpose of this article a hospital is hereby defined to mean any institution or place used for the reception or care, temporary or continuous, of two or more sick, injured or dependent persons; or used for the treatment of two or more persons suffering from or afflicted with any mental or physical disease or bodily injury, including all hydropathic and massage institutions.

“For the purpose of this article a maternity hospital is hereby defined to mean any institution or place used for the reception and care, temporary or continuous, of one or more women during pregnancy while awaiting confinement, during confinement, or for one month or less after confinement while recovering therefrom.

“Unless otherwise specified, the word ‘hospital’ as used in this article shall be held to include maternity hospital.”

True, said Section 1213 provides that "for the purpose of this article" (Article IX), "a hospital is hereby defined to mean," etc. But the legislative body of the city has herein, and nowhere else, particularly defined the meaning of the term "hospital" and in doing so has followed the commonly accepted definition of the term, and such definition must be considered as controlling, with respect to the various ordinances of the city, as to such institutions within the city.

In 21 Cyc. 1105, the general definition of a hospital is stated as follows:

"A hospital is an institution for the reception and care of the sick, wounded, infirm, or aged persons."

The definition contained in the enactment by the City Council found in said Section 1213, is in harmony with this general definition, but is enlarged by provisions more particularly defining a hospital within the city and subjecting it to regulations as provided by its ordinances. Among these particular provisions is the one that a hospital is an institution used for the reception or care of "two or more sick, injured or dependent persons," etc., and "of one or more women during pregnancy while awaiting confinement," etc.

Lest a doubt arise on account of the provisions of Sections 254 and 263, which define Class IIc buildings, we call attention to the fact that there is no inconsistency here. These two sections (254 and 263) are identical, and read as follows:

"In Class IIc shall be included every building used for a hospital, for housing the sick and infirm, imbeciles or children, and also every jail, police station, asylum, house of correction and detention and also every home for the aged and decrepit, where sleeping accommodations are provided for more than ten persons."

While these two sections precede Section 265 and appear in the same article, they do not alter the definition of the word "hospital." In those sections the qualifying phrase "where sleeping accommodations are provided for more than ten persons" qualifies the next preceding phrase, "and also every home for the aged and decrepit," and does not relate to the term "hospital," "jail," "police station," "asylum," or

“house of correction and detention” also used in such sections. This construction is made clear by an examination of similar qualifying provisions similarly placed in the context in the preceding and succeeding articles.

In view, then, of the several ordinances relating to the subject of hospitals, the intention of the City Council as to defining the term must be ascertained by consideration of the various ordinances above referred to and the several provisions thereof relating to the same subject-matter.

Upon such examination we find that the term “hospital” is used in both Article V, on Class II, and Article XXIV, on Frontage Consents, of Chapter XVI on Buildings, and in Article IX, on Hospitals, of Chapter XXXVIII on Health, and further, that the provisions relating to hospitals in said chapter on buildings are naturally related to the subject-matter of said chapter on health. So far as these provisions pertain to hospitals they therefore must be considered and interpreted together and made to harmonize.

Where an application for a building permit for a hospital is presented and a question arises as to whether frontage consents are required under Section 265 of the code, the proper definition for the purpose of determining whether such a proposed building is to be a hospital will be found in Section 1213, where a hospital is defined as a place where two or more sick, injured or dependent persons are received or cared for or one or more women during pregnancy are received or cared for. But where the question to be determined is whether a hospital is entitled to the protection afforded such institutions by ordinances which prohibit the erection of certain classes of buildings within a fixed distance therefrom, then, before such an institution can be regarded as a hospital it must be duly licensed and conform to all the provisions of the law respecting the maintenance of same. In such a case a place to be designated as a “hospital” within the meaning of the ordinances must not only be “an institution or place used for the reception or care, temporary or continuous, of two or more sick, injured or dependent persons, etc., and as to a maternity hospital an “institution or place used for the reception

and care, temporary or continuous, of one or more women during pregnancy while awaiting confinement," etc., but *also* must be such an institution or place as has been made to comply with all the requirements of said Article IX on Hospitals. In other words, an institution or place to be designated as a hospital within the meaning of the ordinance which prohibits the erecting of certain other classes of buildings near it must, in fact and in law, be such and recognized as such.

When an institution or place has complied with all such requirements and has been so recognized and licensed then it becomes a hospital within the meaning of the ordinances, and the definition in said Section 1213, including the number of persons therein fixed as a minimum, applies.

We cannot find that Section 265 has been amended. It is true that said section does not define a hospital, but it does refer by implication to the ordinances on health where a complete definition is set forth.

We are therefore of the opinion, that the definition in its entirety, of a hospital, as found in said Section 1213, with the qualification of compliance, recognition and license, above mentioned, should be looked to by the commissioner of buildings in determining his course of action on an application for the location of a public garage.

Very truly yours,

H. V. SHEPARD,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liquidated Damages for Failure to Complete Contract Within Time Limit.

August 29, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of the 22d inst. asking for an opinion as to the date from which the city's damages should be figured

in the contract with Ahrens-Fox Fire Engine Company for failure of the contractor to complete the contract within the stipulated time. We have examined the accompanying contract and find that it bears date July 17, 1916, and contains this clause:

“The delivery of said engine shall be made to the City of Chicago within one hundred (100) working days from July 19, 1915, the time of commencement, rate of progress and time of completion being essential conditions to this contract.”

The contract also provides for liquidated damages of “ten (\$10) dollars for each and every day passing after the date so fixed for the delivery of said engine until the same is delivered complete.”

It would appear that by excluding Sundays and one holiday (Labor Day) one hundred working days from July 19, 1915, would expire on November 13, 1915.

The provision in the contract fixing the date of completion is specific and makes no reference to and is not limited by, any other contingency.

In the case of *Ludlow Valve Manufacturing Company v. City of Chicago*, 181 Ill. App. 388, the facts were to a great extent similar to the facts in the case under consideration.

In the Ludlow Valve Mfg. Co. case the date of delivery was fixed by the time of acceptance of the bond furnished by the contractor, which date was August 28, 1906; but the contract was not signed by the city comptroller until September 18, 1906, and the contractor claimed a credit of the number of days elapsing between the approval of the bond and the signing of the contract by the comptroller, in computing the city's damages. The court in reversing the judgment in favor of the contractor says:

“It appears also, from the evidence that the bond required by the contract to be filed was approved by the commissioner of public works on August 28, 1906. While there is some evidence tending to show that the contract was not signed by the city comptroller until September 18, 1906, we think the evidence to that effect is insufficient to overcome the express provision of the contract fixing

the date of 'the acceptance of the bond' as the date from which to compute the time of delivery."

We are of the opinion that the same rule would govern in determining the date from which damages would be computed by the city in the contract with the Aherns-Fox Fire Engine Company and that such date is one hundred working days from July 19, 1915.

We return herewith contract and letter of Ahrens-Fox Fire Engine Company dated August 16, 1916.

Very truly yours,

EDWARD H. WRIGHT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Weeds on Vacant Lots.

August 30, 1916.

HON. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

We are in receipt of your letter of the 23d instant in which you request an opinion as to whether the city has authority to compel owners of vacant lots to keep them cleared of weeds which are largely responsible for the prevalence of hay fever.

We are of the opinion that in so far as the common rag weed, which you mention, or other weeds, are detrimental to the health of the community, the city has authority to compel their removal and destruction by the persons upon whose property they exist. This power which we believe the city possesses is derived from the following provisions of the Cities and Villages Act:

(Article V, Sec. 1):

"The City Council in cities * * * shall have the following powers:

"Seventy-five: To declare what shall be a nuisance

and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist.

* * * *

“Seventy-eight: To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

It is well established that municipalities under grants of power similar to the above have the right to declare what is a nuisance, and if, in the exercise of this authority a certain thing which is detrimental to the public health or safety or may reasonably be supposed to be so, is declared to be a nuisance, this declaration will be conclusive upon the courts.

Lauguel v. City of Bushnell, 197 Ill. 20.

28 Cyc. 715.

We believe, therefore, that the city has the authority to require that the owners of vacant property shall destroy weeds of the character which you mention in your letter and provide a penalty for failure to do so. To this effect is the case of *Green v. City of Savannah*, 6 Ga. 1, where the City Council passed an ordinance declaring the cultivation of rice within the limits of the city to be injurious to the public health and providing for its removal and destruction.

In this state there are several provisions in the statutes, including Sections 40 and 41 of the Criminal Code, which require the destruction of Canada thistles, and the Appellate Court has upheld the imposition of penalties for the negligent failure to perform the duty thereby imposed.

See:

Chicago, Milwaukee & St. Paul Ry. Co. v. People, 132 Ill. App. 531.

The People v. Warning, 142 Ill. App. 181.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Installation of Water Meters.

September 1, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In reply to your letter dated August 30, 1916, in which you ask for an opinion as to the right of the city to install meters at premises number 3030 Sheridan road and number 417 Barry avenue; also whether it is the duty of the water department to remove meters installed on the same premises in compliance with Council orders appearing on page 1280, Council Proceedings of July 10, 1916, we beg to advise:

Authority for the installation of water meter service by the city is found in Sections 2747 and 2785, Chicago Code of 1911. Section 2747 provides:

“Every building, structure or premises where the net assessment under frontage rates and charges for extra fixtures shall aggregate one hundred dollars per annum or more *shall* have the water supply to such building, structure or premises controlled by meter.”

Section 2785 enumerates the character and classes of business conducted on premises which are required to be under meter service whether the aggregate net charges are one hundred dollars or not.

The premises in question are apartment buildings and are properly within the class assessed on frontage basis. Under the frontage plan of assessment as required by Section 2760 of The Chicago Code of 1911, the amount of assessments including extra charges against these premises are greatly below one hundred dollars.

We are therefore of opinion, under the existing ordinances, that the city is not justified in the installation of water meters and charging for water furnished as per registration of meters located on the premises in question.

As regards the duty of your department to remove these meters in compliance with Council orders dated July 10, 1916, we beg to advise that since no ordinance authority existed for their installation, and since by Council order they have been

ordered removed, it is clearly the duty of your department to have same removed.

As to the inadequacy of assessments, based on frontage rates, as comparable with service rendered, relief can be obtained only through an amended ordinance such as submitted by you to the chairman of the Finance Committee under date of January 12, 1916.

Respectfully submitted,

LOUIS B. ANDERSON,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Payment of Final Voucher.

September 5, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have letter signed by the auditor of your department asking to be advised whether or not to pay final voucher in favor of Newton & Hoit Company under its contract with the city dated April 1, 1916.

We have examined the original contract together with the letter addressed to you under date of August 22, 1916, by the Harbor and Subway Commission, which executed the contract on behalf of the city, and also a supplemental letter of advice addressed to this office under date of August 29, 1916, by the Harbor and Subway Commission, and find that the contract stipulates that the delivery of all furniture mentioned shall be completed, on June 15, 1916, and provides for liquidated damages to be paid by the contractor for failure to perform its contract within the time specified.

But it appears that under date of April 24, 1916, at least fifty days before the date fixed for the completion of the contract, the contractor notified the Harbor and Subway Commission that a strict compliance with the conditions of the contract in the matter of time would result in the delivery of

the settees without being thoroughly kiln-dried and consequently of an inferior quality; that a representative of the Harbor and Subway Commission made a personal examination of the lumber at the factory and ordered that sufficient time be taken to thoroughly dry the lumber for the settees and that the same be subsequently constructed and delivered.

The question is whether or not the action of Newton & Hoit Company in notifying the city on April 24, 1916, and the action of the Harbor and Subway Commission following such notice, amount to a modification of the terms of the contract and a waiver of liquidated damages on the part of the city.

In the case of *Bloomington Hotel Co. v. Garthwait*, 227 Ill. 613, there was certain additional work ordered by the owner and the stipulations in the contract as to extension of time were not complied with by the contractor. The court says:

“While the notice of appellee, Garthwait, to the architect, asking for an extension of time, may not be technically in compliance with the contract, still the acquiescence of the appellant, through its representatives, until long after the time of this meeting for final settlement, amounts to a waiver of the notice and precludes it from insisting upon a strict compliance with the contract in this respect. Where the delay is caused by extra work directed by the owner and the architect, the contractor can not be held liable therefor. Neither can he be held liable when he is allowed to proceed with the work after the time fixed for its completion, where the owner accepts the work after it is completed and makes payment without raising any question as to the delay. Literal compliance with the provisions of a contract is not essential to a recovery. It will be sufficient if there has been an honest and faithful performance of the contract in its material and substantial parts and no willful departure from or omission of the essential points of the contract. To permit appellant to claim liquidated damages under this contract, under the circumstances shown by this record, ‘would be, in our opinion, contrary to the law and abhorrent to reason and justice.’ *Hartford Deposit Co. v. Calkins*, 186 Ill. 104; *Evans v. Howell*, 211 *id.* 85. See, also, *Foster v. McKeown*, 192 Ill. 339; 30 Am. & Eng. Ency. of Law (2d ed.), p. 1257.”

Our conclusion is that the action of the Harbor and Subway Commission, which represented the city in this contract,

was equivalent to an extension of the time for completion and a waiver of the liquidated damage clause, as it was taken before the expiration of the time fixed in the contract for the completion of the contract; and that the comptroller would be justified in paying the final voucher issued by the Harbor and Subway Commission.

In view of the fact that the contract under consideration contains no reserve clause and does not provide for any time warranty on the furniture delivered, we would suggest that the comptroller exercise the authority conferred upon him by Section 44 of The Municipal Code of 1911, which reads as follows:

“WARRANTS—INVESTIGATION OF—DEPARTMENTS TO ASSIST.) Upon the presentation of any voucher or vouchers for payment, the city comptroller, in his discretion, before issuing a warrant therefor, is hereby authorized to cause to be made an inspection and examination of the article supplied and work and labor performed, whether by written contract or otherwise; also of any items appearing in any such voucher, for the purpose of ascertaining that such items, or any of them, are correct and the price and quality of the labor or service performed and the price, quality and amount of goods, wares and merchandise represented by such voucher, are fair and just, and in accordance with the terms of the written contract, if any there be, and that all requirements and obligations, expressed or implied, pertaining thereto, have been complied with.

“For any such examination and inspection, departments, bureaus, boards and persons having supervision of work and labor or the purchasing of supplies or material to be paid for by the city, are hereby directed to render such assistance to the comptroller as may be necessary to determine the price, quality and character of the work and labor performed, material supplied, or the faithful performance of contracts.”

We return voucher, contract, and letter of Harbor and Subway Commission dated August 22, 1916.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Issuance and Approval of Bonds on Which to Borrow Money After Annual Appropriation Bill Has Been Adopted; and Making Contracts Extending Beyond Fiscal Year Payable from the Electric Street Lighting Extension Bond Fund.

September 6, 1916.

HON JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

You have propounded to us two inquiries which we will answer.

Your first inquiry is this:

“Is it necessary for the annual appropriation bill to provide for any bonds that may be submitted to the voters during the year for ratification or rejection.”

Assuming that such bonds are to be issued to borrow money on the credit of the city for corporate purposes, we answer the above inquiry in the negative. In our opinion there are two requirements with respect to the issuance of such bonds; (a) that the indebtedness incurred by them, including existing indebtedness of the city in the aggregate shall not exceed five per centum on the value of the taxable property in the city to be ascertained by the last assessment for the State and County taxes previous to the incurring of such indebtedness, and, (b) before or at the time of incurring such indebtedness the City Council shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years after contracting the same.

We think this inquiry is especially governed by Section 12 of Article IX of the Constitution and by Section 1, Paragraph Fifth of Article V of Chapter 24 of the Statutes. Said Section 12 of Article IX of the Constitution reads as follows:

“No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property

therein, to be ascertained by the last assessment for State and County taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor."

Said Section 1, Paragraph Fifth of Article V of Chapter 24 of the Statutes reads as follows:

"The City Council in cities and the President and the Board of Trustees in villages shall have the following powers:

* * * * *

"*Fifth.*—To borrow money on the credit of the corporation for corporate purposes, and issue bonds therefor, in such amounts and form, and on such conditions as it shall prescribe, but shall not become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate to exceed five (5) per centum on the value of the taxable property therein, to be ascertained by the last assessment for the State and County taxes previous to the incurring of such indebtedness; and before or at the time of incurring any indebtedness, shall provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years after constructing (contracting) the same."

Your second inquiry is this:

"On pages 973, 974 and 975 of the Council Proceedings of June 26, 1916, a number of appropriations for the extension of electric street lighting system from bond issue appears. At the end of this appropriation ordinance there appears the following provision 'to be expended in 1916, \$291,100.' The question is, can the

City Council authorize department heads to enter into contracts in excess of the \$291,100."

Assuming this inquiry to be limited to contracts which are to be payable only out of the existing "Electric Street Lighting Extension Bond Fund" we answer this inquiry in the affirmative.

The appropriation ordinance of June 26, 1916, to which you refer (Council Proceedings, page 973) is as follows:

"Section 3. That there be and is hereby appropriated from the Electric Street Lighting Extension Bond Fund the following amounts for the purpose of extending the municipal electric street lighting system."

Then follow numerous items for different work and materials specifically appropriated to various named sub-station districts. These are followed by a provision—"to be expended in 1916" under which are specified sundry items aggregating \$291,100.

Our understanding is that the bonds referred to were authorized and issued for the sole purpose of borrowing money to pay for the improvement specified, and the ordinance quoted expressly appropriates the sum therein named from the funds derived from such bonds to the payment for such improvement, the only limitation attached to such appropriation being that there shall be expended in 1916 the sum of \$291,100. Your inquiry does not call for an opinion and we do not express an opinion upon the question whether or not such limitation is, in law, effectual to limit the expenditure out of this appropriation during the year 1916 to said sum of \$291,100.

As we are advised, the concrete situation presented is that the commissioner of electricity finds that in order to procure the delivery of the necessary supplies, particularly copper wire, in time to enable him to duly prosecute this improvement next spring, he must, in the very near future, enter into contracts in excess of \$291,100, the performance of which will extend approximately over the year 1917 and possibly longer, but the payments on such contracts during the year 1916 will not exceed such \$291,100.

We deem it unnecessary at this time to express an opinion whether or not the commissioner of electricity would be authorized in entering into such contract without the consent and approval of the City Council; your inquiry being whether the City Council can authorize department heads to enter into such contracts. Confining ourselves to the precise question presented, we are of the opinion that with the consent and approval of the City Council such commissioner would be authorized in entering into such contracts, the same to contain a provision to the effect that they shall be payable only from the Electric Street Lighting Extension Bond Fund and a further provision to the effect that payments on such contracts, after the exhaustion of the \$291,100, above referred to, shall only be made as appropriations therefor shall be provided by the City Council out of said Bond Fund. This latter provision may be unnecessary, but we deem it at least proper in view of the obvious desire of the City Council manifested by said ordinance of June 26, 1916, that it should be consulted as to the amount to be expended for this improvement during any given year.

Nothing herein stated shall be taken or construed as referring in any way to contracts for improvements to be paid for out of the general funds of the city.

Very truly yours,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Re-Organization of the Purchasing Department.

September 8, 1916.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

In a letter of recent date, addressed to the corporation counsel, you asked for answers to a series of questions prepared by the engineer of the Efficiency Division stating that

it was necessary to have these inquiries answered in order to prepare a report which has for its purpose the re-organization of the Purchasing Department. We will answer the questions in the order in which they are asked.

1. What are the steps necessary to take away the purchasing power of the Departments of Electricity, Health, Police, Fire and all others making contracts over \$500; what steps are necessary for the Department of Public Works, city clerk and Small Parks Commission; what steps are necessary for the Board of Education, Library, Municipal Tuberculosis Sanitarium, House of Correction and all other institutions and boards appointed by city officials, assuming that city department heads, appointed by the mayor, desire to relinquish this right?

The only legislation necessary to take away the purchasing power of the Departments of Electricity, Health, Police, Fire, Public Works and of the city clerk and Small Parks Commission and all other departments making contracts of over \$500 is to change the ordinances giving the heads of such departments and such officers power to make contracts of that kind. In the case of the Board of Education, Public Library and Municipal Tuberculosis Sanitarium, it will be necessary to secure legislation by the General Assembly changing the statutes.

The commissioner of gas and electricity is given authority, under Section 826 of The Chicago Code of 1911, as amended, to award and execute contracts for materials and supplies provided he advertises and lets the contracts in the same manner as is provided for the letting of similar contracts by the Department of Public Works. If that portion of said section which gives him this authority is repealed, that will dispose of the matter, except that it will be necessary to give such authority to the business agent of the city.

Powers of a similar nature are given to the commissioner of health under Section 1163A of said code (said section having been passed on March 1, 1915, and appearing on page 3796 of the Council Journal of that date); to the general superintendent of police by Section 1911; to the fire marshal

by Section 882, and to the city clerk by Section 15, and these powers may be abrogated in the same way by simply repealing or altering those sections, as the case may be, so as to take away that power.

With regard to the commissioner of public works, all the provisions relating to the manner of entering into contracts, essential clauses therein, bonds covering the same, etc., are contained in Sections 2102 to 2115 of the code. These sections must necessarily be repealed and the provisions of same be transferred to that part of the code which gives powers to the business agent if it is the intention to place these powers into the latter's hands.

With reference to the Small Parks Commission, it is doubtful whether the ordinances at the present time give any power to make contracts by reason of the fact that this commission has been changed so that it is now handled by a committee of the City Council, and such committee cannot exercise administrative powers of that kind. The powers conferred on this commission are contained in Section 1705 of the code, which would have to be repealed if there is to be a transfer of this power.

With reference to the House of Correction, there seems to be an implied statutory power authorizing the Board of Inspectors to make contracts for ordinary and necessary expenses and repairs, nevertheless it has been assumed that this power is subordinate to the general powers of the City Council relating to contracts, and we believe that the statute will be so construed. The City Council has given authority to the Board of Inspectors under Section 1505 of the code, as amended, to make contracts. This section will have to be amended so as to take away this power, and, as stated above, we believe that this will be the only thing necessary.

In order to take away the power of the Board of Education to make such contracts, the statute relating to schools will have to be amended. Sections 132, 133 and 134 define the powers and duties of the Board of Education, and the authority of this board to make contracts is complete as to all matters except the erection or purchase of buildings, the purchase of sites for school purposes and the issuance of

bonds. In such matters as those last mentioned there must be concurrence by the City Council.

The powers of the Library Board are defined in Section 5 of the Library Act, and include the power to contract without reference to the action of the City Council. There would, therefore, have to be an amendment of this statute.

The same is true with respect to the powers of the Board of Directors of the Municipal Tuberculosis Sanitarium, which is given authority, under Section 6 of the statute authorizing the creation of same, to make contracts independent of the City Council, although such contracts must be made in accordance with the ordinances of the city, and the power to purchase or lease ground or to lease or erect buildings can be exercised only with the approval of the City Council.

By the legislation indicated above the power to contract will be taken away from the various officers, departments and quasi-public corporations, and provision can then be made for lodging this power in the Purchasing Department.

Your next question is as follows:

2. What steps are necessary to give the power to the Purchasing Department?

The ordinances at the present time give the city comptroller supervisory powers in relation to contracts, and we assume that there is no intention of taking these powers from him. We therefore simply point to Sections 24 and 44 of the code as containing the provisions which give the comptroller this power.

Section 50, relating to the making of contracts by heads of departments, would have to be changed so as to confine the same to the business agent only. We do not believe there would be any occasion to change Section 93, which requires the corporation counsel to draw contracts as requested by the heads of departments, nor Section 1658, which relates to contracts which cannot be made during the month of December. The chapter governing the work of the Department of Supplies—and particularly Sections 2517 and 2518—would have to be altered. The provisions above referred to, contained in Sections 2102 to 2115 relating to the manner of

making contracts, would have to be altered and re-enacted so as to put the powers and authority contained therein in the business agent of the city and to require of him the execution of contracts in the manner now provided for the commissioner of public works.

Your next question is as follows:

3. What are the steps necessary to transfer the Testing Division from the Bureau of Engineering to the comptroller's office?

There is now no provision in the code establishing a Testing Division or prescribing its duties further than may be implied from the general powers and duties of the commissioner of public works and from the fact that appropriations are now made for this division under the general heading of the Bureau of Engineering. If it is desired to transfer this division bodily to the comptroller's office it would be necessary to draft a new ordinance creating such a bureau and specifying that it shall be under the city comptroller. The ordinances relating to the duties and powers of the commissioner of public works need not be altered, but there ought to be some references to those ordinances in the new ordinance creating the new bureau in order that there may be no conflict of authority.

Your next question reads as follows:

4. How shall a board of purchase be established to pass on all contracts over \$10,000 in value, assuming that this board consists of the business agent, comptroller and chairman of the Finance Committee?

Such a board of purchase can be established by ordinance and may be composed of such officers of the city as it sees fit to name, except that there would be some doubt as to the propriety of placing the chairman of the Finance Committee on this board. While by the very nature of things the chairman of this committee exercises some functions which might be regarded as the functions of an executive officer, the law does not make any exception of him when it prohibits aldermen from occupying other positions in the city government. It will depend largely on the nature of the powers given to

this board of purchase whether or not he can act in that capacity.

Your next question is as follows:

5. Are any legal steps necessary to eliminate some of the unnecessary signatures from present vouchers? Which can be most easily dispensed with? What signatures are required by law?

The elimination of unnecessary signatures from vouchers is entirely within the control of the city comptroller at the present time. He is given power under Section 60 of the code to prescribe the form of such voucher, and it is for him to say what signatures are necessary and how they shall be attached. There is no other provision of the ordinances which in any way curtails this power. The statutes make no provision whatever for signatures on vouchers, and it is doubtful whether the word voucher as used in the statutes has the same significance as when it is used in the ordinances and by the heads of departments in relation to the city's affairs. The word "vouchers" as used in the statutes seems to have reference more particularly to receipts rather than the forms that the ordinances and the Department of Finance have provided for. The Cities and Villages Act (Article VII, Section 11) requires all warrants drawn upon the treasurer to be signed by the mayor and countersigned by the clerk (comptroller), but there is no provision concerning signatures of vouchers.

The last question is as follows:

6. What will be necessary to give the purchasing agent the right to call on departments for expert advice concerning specifications or other information he may need? (The comptroller now has that right.) Can the purchasing agent do it now through the comptroller?

The right to call on heads of departments for information and assistance, including such expert advice as is necessary in order to properly safeguard the interests of the city is now given to the city comptroller by Section 44 of the code. Similar authority can be given to the business agent by ordinance if that is desirable. Under the code as it now stands,

the business agent has not the right to demand this of department heads, although it would probably be entirely practicable to secure such information through the comptroller. There is no doubt that the comptroller in the exercise of his powers and duties as prescribed by law would always be willing to assist the business agent to secure the necessary expert advice that he may need. It would assist the comptroller as well as the business agent. If, however, the ordinances are to be amended in such a way as to give the business agent enlarged powers, and so as to have him act in a supervisory capacity with relation to all city contracts, it would be just as well to specifically place such power into his hands.

Yours respectfully,

FRANK S. RIGHEIMER,

LEON HORNSTEIN,

Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Protection of Openings Caused by 12th Street Improvement.

September 18, 1916.

HON. M. J. FAHERTY, President, Board of Local Improvements.

Dear Sir:

In reply to your verbal request for information as to where the responsibility lies for protecting openings caused by the removal of buildings on West Twelfth street in the course of the making of the improvements thereon, we beg to advise you that the duty of taking reasonable precautions to prevent accidents to the public from such openings devolves on the Board of Local Improvements.

The widening of Twelfth street is a local improvement coming within the sphere of your board, and the same rule prevails as in the case of any other street improvement made by you. That is to the effect that when a street is turned

over to you for improvement the board takes charge of it, and the commissioner of public works is relieved of the care of same until the street is completed and again turned over for the use of the public. When such street or any portion of it is completed the jurisdiction of the commissioner of public works again attaches to it or to such portion of it as is so turned over.

The provision of the ordinances governing the situation is contained in Section 2068 of The Chicago Code of 1911, which reads as follows:

“POWERS.) Said commissioner shall have charge of all public improvements commenced, or to be commenced, by said city, and shall have power, subject to the ordinances of the city, to regulate and control the manner of using the streets, alleys, highways and public places of the city, for the erection of telegraph poles, or other poles or posts; for the laying down of gas, water or steam pipes, sewers, conduits and other underground construction authorized by law or the ordinances of the city, and to determine the location thereof; and to cause the prompt repair of the streets, alleys, highways and public places, whenever the same are taken up or altered; provided, that nothing herein contained shall be construed as relating to the construction of local improvements paid for in whole or in part by special assessment; provided, however, that said commissioner shall have charge of all local improvements paid for in whole or in part by special assessment upon their completion and acceptance by the Board of Local Improvements, or upon their completion, acceptance and approval by the court confirming the assessment, and said commissioner shall have power to enforce all provisions of any contract for such improvements which relate to the guarantee and maintenance of such improvements and the repairs thereto.”

In the making of an improvement of the kind in question, where a portion of the street is in use while the rest is being improved, the commissioner of public works retains jurisdiction of only that part of the street which is open for traffic. If it is necessary, in the exercise of reasonable care, to place barricades or protections on any part of the street that is being improved, that work must be regarded as a part of the

work of improvement and should be taken care of by the Board of Local Improvements.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Permits Issued for Frame Cottages Outside of Fire Limits,
Subsequently Included Within Fire Limits.**

September 18, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your communication, addressed to the corporation counsel, requesting an opinion on certain phases of the above matter, referred to the undersigned for attention.

You state in your letter that on March 19, 1915, a permit was issued for eleven frame cottages, said cottages being located at that time outside of the city fire limits; that on March 22d, the limits were changed so that these houses were within the fire limits; also, that eight of these buildings were commenced within the six months' period as required by Section 229 of The Chicago Code of 1911 and of the remaining three no construction work was started but excavations for the basements were commenced, the contractor having filed an affidavit with your department that the excavating was done within the six months' period after the date of the permit.

You wish to be advised, first, if the work of excavating within the six months kept the permit alive; second, if the work of construction on these buildings had not yet begun, after a lapse of fourteen months from date of permit, are such permits void under Section 229 owing to the fact that operations called for were not completed within a reasonable time; third, if the permits are void, can the contractor take advan-

tage of Section 229 and have such permits extended by paying the fee as provided by the ordinance, notwithstanding the fact that it is now illegal to erect frame buildings in these locations. The section of the ordinance involved herein is as follows:

“229. PERMITS—WHEN REQUIRED—LIMITATIONS OF TIME FOR.) Before proceeding with the erection, enlargement, alteration, repair or removal of any building or structure in the city, a permit for such erection, enlargement, alteration, repair or removal shall first be obtained by the owner or his agent from the commissioner of buildings, and it shall be unlawful to proceed with the erection, enlargement, alteration, repair or removal of any building or of any structural part thereof within the city unless such permit shall first have been obtained from the commissioner of buildings. And if after such permit shall have been granted, the operations called for by the said permit shall not be begun within six months after the date thereof, or if such operations are not completed within a reasonable time, then such permit shall be void, and no operations thereunder shall be begun or completed until an extended permit shall be taken out by the owner or his agent, and a fee of ten per cent of the original cost of permit shall be charged for such extended permit.”

These matters involve not only questions of law but also questions of fact and perhaps it may be said that the decision involves the passing upon mixed questions of law and fact. We are not prepared to say that these contractors have the right to proceed with the construction of the cottages named within the new fire limits. To say the least, their right to do so is doubtful, and we think the doubt should be resolved in favor of the city and the work stopped until the builders establish their right to proceed, if any they have, by appropriate court proceedings.

Yours very truly,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Power of Municipality to Compel Railroad Companies to Construct Ditches and Drains So That Natural Drainage of Adjacent Property Shall Not Be Impeded.

September 19, 1916.

W. B. COONEY, Esq., Pekin, Illinois.

Dear Sir:

We are in receipt of your letter of recent date in which you ask for an expression of opinion as to what might reasonably be expected from the courts in the event that a city in Illinois attempted to exercise the powers conferred by Clause 27 of Section 1, Article V of the Cities & Villages Act.

The clause in question authorizes cities and villages to require railroad companies to keep flagmen at railroad crossings, to compel them to raise or lower their tracks so as to conform to the grade of the highways alongside and crossing same, and to require them to keep open and to keep in repair ditches, drains, sewers and culverts so that filthy or stagnant pools of water cannot stand on their grounds or right-of-way, and so that natural drainage of adjacent property shall not be impeded.

In our opinion all these powers come within the police powers of the state and are properly delegated to municipalities and may be enforced.

You state in your letter that from your reading of certain cases decided by the Supreme Court of this state it would seem to you that the power to compel railroads to construct crossing approaches and to build bridges is not within the police powers of the municipality. We quite agree with you that this power does not exist, but beg to refer you to the language used in the clause in question, because we do not believe that such an inference can be drawn from the language used.

The case of *Illinois Central R. R. Co. v. Bloomington*, 76 Ill. 447, to which you refer, decides that it is not within the power of the Legislature to require existing railroad companies to construct suitable and proper crossings for streets and highways which are laid or extended across their tracks

after they have graded and built their railroads. This is an entirely different thing from compelling the railroads to raise or lower their tracks so as to conform to the grade. In other words, the railroad company cannot, in the absence of a provision to that effect in its charter, be compelled to construct streets and approaches so as to make them suitable for traffic. It can, however, be compelled to raise or lower its tracks if they are so constructed that they interfere with traffic.

Again, the case of *Sanitary District of Chicago v. C. & A. R. R. Co.*, 267 Ill. 252, decides that a railroad company can not be compelled to construct a bridge over an artificial channel constructed by a municipality and that if such channel is cut through the right-of-way of the railroad the latter can recover to the extent that it is injured. This, in our opinion, does not touch the question of the right to compel a railroad company to keep open and repair ditches, drains, sewers, culverts, etc., in order to maintain a natural drainage.

It would seem as though the duty rested on a railroad company to maintain the natural drainage without legislation of any kind. (See Lewis on Eminent Domain, Section 89, where it is held that if a railroad company constructs an embankment which forms a barrier to the natural flow of surface water and causes the same to collect in a ditch beside the road, the company is liable on the ground of its being a taking of land that is damaged thereby.)

In the case of *Alton H. R. & C. Co. v. Deitz*, 50 Ill. 210, the court held the railroad company liable for obstructing the passage of water which flowed back on the land of the party complaining. And, in the case of *Village of Hampton v. C. M. & St. P. Ry. Co.*, 125 Ill. App. 412, the court held that it was unlawful for the railroad company to maintain and use a railroad grade or track at a grade higher than and different from that established by a general ordinance quoted in the decision.

Dillon, in his work on Municipal Corporations, 5th Edition, Section 1241, lays down the rule that railroad uses in and across public streets must not exclude public travel.

We also beg to refer you to the case of *Proprietors of*

Locks & Canals v. Nashua & Lowell R. R. Co., 64 Mass. 385. While this case holds against the parties complaining, it recognizes the principle that a railroad company has no right to obstruct a gutter alongside of the street which carried off surface water from lands abutting on the street.

We have no doubt that there are many other cases that could be cited on this point and it seems to us that as long as the municipality which you represent adheres strictly to the powers granted under the clause in question there can be no doubt of its right to compel railroad companies to conform to same. All of the provisions of said clause are intended to protect the public, both as to life and property, and therefore must come within the police powers.

The writer has not had occasion to take up the question directly in any proceeding that he has been connected with, and so far as has come to his observation no question as to the validity of that clause of the statute has ever been raised in the courts of this county. We have endeavored, however, to give you our views on the subject supported by such authority as was readily accessible without an exhaustive study of the questions you raise.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Damage to Premises and Personal Property Caused by
Dynamiting in Order to Apprehend Criminals.**

September 20, 1916.

HON. CHARLES C. HEALEY, General Superintendent of Police.

Dear Sir:

Replying to yours of August 19th, in which you ask for an opinion from this office in relation to the city's liability for damages sustained to the premises at 318-320 Irving avenue (then owned by Harry Edwards) and to the household furniture of Edward Amos, a tenant, by reason of the fact

that the Police Department dynamited the premises in order to capture Henry J. McIntyre and wife, who had killed several people, and resisted arrest on the morning of July 18, 1916, permit us to say that it is well settled law in this state that the city is not liable for the acts of its police officers. The doctrine of *respondeat superior* does not apply.

Dillon on Municipal Corporations, 5th Edition, Sec. 1656.

Blake v. City of Pontiac, 49 Ill. App. 553.

Wilcox v. City, 107 Ill. 334.

Craig v. City, 180 Ill. 154.

Tollefson v. Ottawa, 228 Ill. 134.

Evans v. Kankakee, 231 Ill. 223.

Johnston v. City, 258 Ill. 494.

We are, therefore, of the opinion that the city is not liable and cannot be made to respond in damages. The facts, however, in the premises, we think, constitute equities in favor of the claimants which will justify the City Council taking such action as it may deem proper.

We herewith return estimates attached to your communication; also, a copy of power of attorney given by Harry Edwards to John F. Grams, conferring authority upon him to act in his name for the purpose of compromising or settling this matter.

Respectfully yours,

H. L. BRIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Creation of an Executive Department.

September 20, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

In reply to your letter of recent date asking what council

action is necessary relating to the Bureau of Waste Disposal, we beg to say:

1. The Council on the 12th day of June, 1916, (Council Proceedings, page 690), undertook to (a) create "an executive branch of the municipal government" which, by its executive head, would have the management and control of all matters pertaining to the Municipal Reduction Plant, or plants, incinerators and all other plants for the disposal of wastes, etc., and, (b) to designate the mechanical engineer in charge, who was Henry A. Allen, to be the executive head of such bureau.

2. We do not deny the power of the City Council to create such executive branch of the municipal government; but it is clear to us, and we anticipate it will be clear to you on reflection, that the City Council had no right or power to appoint the head of such branch.

3. Sections 2 and 3 of Article VI of the Cities and Villages Act read as follows:

"The City Council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, *or the appointment by the mayor*, with the approval of the City Council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, *and such other officers as may by said Council be deemed necessary or expedient*. The City Council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other city officer; and no officer, filling any such office so discontinued, shall have any claim against the city on account of his salary, after such discontinuance. The city marshal shall perform such duties as shall be prescribed by the City Council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws; he shall possess the power and authority of a constable at common law, and under the statutes of this state. (R. S. '74, p. 224, Sec. 73.)

"*All officers* of any city, except where herein otherwise provided, *shall be appointed by the mayor* (and vacancies in all offices except the mayor and aldermen

shall be filled by like appointment) *by and with the advice and consent of the City Council*. The City Council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of any such office; provided, the term shall not exceed two years. (R. S. '74, p. 224, Sec. 74.)"

4. Therefore, as it seems to us, it is clear that Colonel Allen is undertaking to fill the office of executive head of the Bureau of Waste Disposal without warrant or authority of law. Nothing herein is intended or should be construed as a personal attack upon Colonel Allen. His name is mentioned for the sole purpose of bringing the existing condition concretely to your attention.

5. Please consider in brief outline the practical situation with which we are confronted.

Here is an important branch of the municipal government which is expending hundreds of thousands of dollars of the city's money. It is in charge of an executive head who is occupying his position without authority of law. He is not responsible to the mayor, although the law plainly requires that he should be appointed by the mayor with the consent and approval of the City Council. Yet the mayor is called upon to approve the contracts which are made by such executive head involving the expenditure of these vast sums of money and also the vouchers given by the city in payment thereunder. Such approval by the mayor is not a mere matter of form but requires the exercise of discretion on his part and, in the last analysis, he will be held responsible for these contracts and for what is done under them.

6. Under the law the mayor, even if he were disposed to do so, could not shift the responsibility for this waste disposal business from himself to some one else. He is confronted by the fact that he has been elected as chief executive officer of the city by the people; and he cannot escape the responsibility, while he is mayor, of performing the duties of such chief executive officer, among which is the duty of appointing the heads of the executive branches of the municipal government, by and with the advice and consent of the City Council,

and holding them responsible for the proper performance of the functions of their offices.

7. It has been suggested that Colonel Allen can in some way derive a right to hold the office of executive head of the Bureau of Waste Disposal under the law relating to civil service; but we anticipate that no one familiar with the subject will consider that proposition to be sound.

8. In conclusion, we suggest that council motion necessary in this matter, is to enact a proper ordinance providing that the head of this executive branch of the municipal government shall be appointed by the mayor with the consent and approval of the City Council as the law requires; assuming, of course, that the Council continues to be of the opinion that it is wise to have a separate department in charge of the waste disposal business rather than to leave the same in charge of a department already established.

Very truly yours,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Regulation of Private Banks.

September 22, 1916.

HON. JOSEPH C. BLAHA, Alderman, 34th Ward.

Dear Sir:

We have had under consideration a draft of the ordinance providing for the regulation of private banks which was recommended for passage by a sub-committee of the Judiciary Committee, of which you are chairman.

The ordinance in question requires the persons, firms or associations, maintaining a private banking business within the City of Chicago, to secure a license therefor from the city comptroller and pay an annual fee of two hundred (\$200) dollars; it restricts the issuance of licenses by requiring that persons desiring to conduct a business of this character shall

have net assets over and above liabilities of a value of at least twenty-five thousand (\$25,000) dollars and it further contains provisions with regard to the amount of currency which shall be kept on hand, the amount of money which may be loaned out and the amount of capital which shall be kept invested in the business; it gives to the city comptroller the right to inspect the books of the licensee and makes provision for reports, etc.

It is apparent from an examination of the proposed ordinance that it contemplates thorough regulation of the business of such private banking as comes within its terms. While there are no authorities in this state which indicate how far the city may go in regulating private banks, it is clear that it may require private bankers to take out licenses as a condition precedent to their right to engage in the private banking business and that it also has certain powers of regulation.

The authority vested in the city in reference to this subject is derived from the Cities and Villages Act, Article V, Section 1, which is as follows:

“The City Council in cities, and president and the board of trustees in villages, shall have the following powers:

“Ninety-first. To tax, license and regulate auctioneers, distillers, breweries, lumber yards, livery stables, public scales, *money changers* and brokers.”

In the case of *Hinckley v. City of Belleville*, 43 Ill. 183, the court held that the business of “money changer” embraced a considerable part of the business of banker and that under the charter of the City of Belleville, which authorized it to license, tax and regulate money changers, that city had the right to require private bankers to take out licenses and pay a license fee of one hundred (\$100) dollars. The court said:

“Without considering the question as to how far a banker and a money-broker are the same in the common parlance and business usages of this state, there is at least no doubt that the term “banker” includes all the business of a money-changer. A money-changer is defined by Webster to be ‘a broker who deals in money or ex-

changes.' The word has passed out of common use, but when used, we understand it in the sense given by the learned lexicographer. Thus defined, it is certainly included in the business of a banker, and constitutes, indeed, the greater part of it. So, also, the buying and selling of uncurrent funds, and the exchanging one kind of money for another, are equally the practice of the money-changer and the banker. Indeed we are not aware of any kind of business understood to be within the former term, which is not considered a part of the business of a private banker, as carried on within this state, and we must construe the term "banker," used in this agreed case, as comprehending the various kinds of business ordinarily carried on by bankers among our own people. If, then, the business of the banker includes that of the money-changer, he may certainly be required to take out a license under that provision of the charter which applies to money-changers."

This reasoning would be clearly applicable in determining the city's power of regulation over private banking institutions, and we believe that an ordinance providing for such regulation would be sustained by the courts. In the absence of authorities shedding additional light upon the extent to which the city may go in providing such regulation, however, it is impossible to state with certainty that all of the provisions of the proposed ordinance will be upheld, and we have, therefore, provided in the ordinance that if any part thereof should be held invalid or unconstitutional such decision shall not affect the validity of the remaining portion of the ordinance.

We think that the draft of the proposed ordinance which has been submitted to us will require several amendments in order to properly safeguard the interests of the public. We expect to have the ordinance, duly amended, ready for you by next Thursday.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

In Re License Fee of Ravenswood Hospital.

September 22, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You submitted to us the question of the right of the city's officers to remit the license fee of the Ravenswood hospital under the state of facts existing in regard to same, the hospital authorities claiming that said hospital is exempt from same as a charitable institution under the provisions of Section 1216 of The Chicago Code of 1911.

The said section of the code provides that if the applicant for a hospital license presents an affidavit showing that the hospital during the previous calendar year has given its patients not less than ten per cent of its general average capacity of bed days "free of charge of any sort," the license fee may be remitted in case the commissioner of health, upon inquiry into the facts, recommends such a course.

We assume that the necessary affidavit has been made and that the commissioner of health is ready to make such recommendation if the point raised in your letter is cleared up in favor of the applicant.

It appears that the question of whether or not the said hospital can be regarded as within the class which may be exempt from such fee hinges on the case of a single patient—an infant who was treated in the hospital for 324 days covering two separate periods. The ledger account of this patient shows a charge of \$396, on which has been credited the sum of \$52, made up of small payments of from \$5 to \$15.

A written statement from the parent of this child has also been submitted to us to the effect that the payments above mentioned were intended for "clothing and necessary luxuries." We do not look upon this statement as of importance in determining the question at issue, and will treat the payments as being on account of service.

Under a former opinion from the Department of Law it was held that where a hospital made a reduction in the charge for service and treatment to patients who were un-

able to pay the regular rates, such reduction in rates could not be included in the total of the service rendered for charity because such service was not "free of charge of any sort." (See opinion of March 22, 1912, in Book of Opinions from April 1, 1911, to December 31, 1912.)

We do not look upon the present case, however, as one where a reduced charge was made for a patient, but rather as an instance of a hospital retaining a patient long after any reasonable expectation of collecting the charges put upon its books from time to time had vanished. The child was in the place 324 days, which would have meant nearly eleven months in case there had been no interval between the two periods of treatment. While we are not informed as to the interval which elapsed between these periods, it is clear that the charges incurred extended over a period of approximately a full year. The payments extended over a period of about ten weeks. It would seem to follow that the hospital authorities, long before the year had expired, must have looked upon the child as a charity patient. The mere fact that charges were made on the books on this account during the entire period, or even after efforts were made to collect, does not overcome the presumption which would naturally arise that there was no expectation of payment of any considerable amount.

Under the circumstances, we believe the hospital ought to be credited for charity work for the amount unpaid on this account. It would involve niceties of distinction and conjecture to determine just when the hospital authorities began to regard the services rendered in the light of charity. But we believe it would be fair to credit them at least with all but ten weeks of the 324 days in estimating whether the institution may rightfully be entitled to exemption from the license fee.

Therefore, if you find that by such credit the institution qualifies as a charity hospital under the code, a recommendation of the commissioner of health for remission of license fee should be accepted as sufficient to warrant such action.

We return herewith written statement of parent to which we refer in the above opinion.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Discharge of Employees Appointed Under Civil Service.

September 25, 1916.

HON. WILLIAM R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

In reply to your verbal request to be advised as to whether you have the legal right to discharge for cause certain persons now employed in the Bureau of Water, whom you are informed now occupy the position therein of "shut-off man," not because of their having been examined as to their fitness for such position and certified thereto under the provisions of the Civil Service Act, but by reason of their having been assigned by some head or heads of said bureau, subsequent to their certification thereto as "laborers," to perform the duties of the position designated as "shut-off man;" we beg to say we are advised that among the individuals now occupying the position therein of "shut-off man," the following named persons, *i. e.*, Walter D. Cochran, Wm. Colwell, Wm. J. Dorsey, John Kennedy, John Malloy, Lawrence Meehan, Lawrence Ryan, Wm. A. Wall and Chas. Duffy were certified to said bureau from off divers eligible lists of persons examined for and qualified to fill the position of "laborer," then included in the civil service classification known as "Class C—Labor Service," which classification was, on May 14, 1912, changed to what is now existent and known as "Class L—Labor Service;" that subsequent to such examination and certification to said bureau the foregoing named persons were assigned by some head or heads of said bureau to perform the duties of and fill the position therein desig-

nated as "shut-off man," for which, in the year 1897, an examination was expressly held, and which now is and for some time past has been included within the civil service classification known as "Class K—Skilled Labor Service."

The law is well established that a person who seeks the protection of the Civil Service Act must show that he was examined for and certified and appointed to the position which he claims the legal right to occupy, in accordance with the provisions of the Civil Service Act and the rules of the Civil Service Commission adopted thereunder; in view of which and the further fact that nothing appears of record to show that the foregoing named persons, or either of them, were thus examined and certified to the position of "shut-off man," or examined for and certified to any position other than that of "laborer" as then classified in "Class C—Labor Service," we must conclude that the present civil service status of each and all of the foregoing named persons is that of a "laborer."

Section 12 of the Civil Service Act reads in part as follows:

"No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except *for cause*, upon written charges and after an opportunity to be heard in his own defense.
* * * Nothing in this section shall be construed to require such charges or investigation in cases of laborers.
* * *"

The language contained in the latter part of the foregoing section is clear and express as to its meaning, and that the appointing power is possessed of the legal right to discharge laborers, without written charges or investigation thereof, is further evidenced by the language of the court in the case of *Hughes v. Traeger*, 264 Ill., wherein on page 617, the court said:

"Under Section 6 of the Civil Service Act laborers may be removed without written charges or hearing, and it seems reasonable, therefore, that they should not be required to contribute to the pension fund unless they desired to."

The mention made of Section "6" is undoubtedly a typographical error and should read Section "12", inasmuch as the provisions of Section 6 of said act are in no way analogous to the language used by the court, while the same would apply to the provisions contained in Section 12 of said act.

In view of the foregoing we are of the opinion that, if for any cause, such as the good of the service, you believe that the foregoing named persons should be discharged from the service of the city, you have the legal right to discharge such persons without filing written charges against the same or affording them an opportunity to be heard in their own defense.

As to Thomas Flynn and S. L. Holbrook, now employed in said bureau in the position of "shut-off man," the records of the Civil Service Commission show that they are "hold-overs," or to be exact, they now occupy their present positions, not because of any examination and appointment there-to in accordance with the provisions of the Civil Service Act, but solely by reason of having occupied the same prior to the adoption by the city of said act.

The Supreme Court of this state has repeatedly held that only such officers and employes of the city as have been examined and appointed in accordance with the provisions of the Civil Service Act are afforded any protection under the provisions of said act pertaining to removals.

Preston v. City of Chicago, 246 Ill. 26.

People v. City of Chicago, 242 Ill. 567.

Kenneally v. City of Chicago, 220 Ill. 501.

McNeill v. City of Chicago, 212 Ill. 491.

Stott v. City of Chicago, 205 Ill. 281.

In view of the foregoing we are of the opinion that, with the consent and approval of the mayor, you may legally discharge the last named persons, whose status is that of "hold-overs", for such cause and at such time as you may deem fit and proper.

Respectfully yours,

HERVEY C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Status of Attorney Formerly Representing City in Special
Assessment Case.**

September 29, 1916.

PHILIP J. McKENNA, Esq., 1347 Conway Building, Chicago.
Dear Sir:

I have your letter of recent date. In the first paragraph of the same you say:

“My attention has been called to certain words attributed to you in the Chicago Herald, Chicago Examiner and Chicago Tribune of this date, wherein you say that my connection with the Michigan avenue case is ‘unethical and unprofessional.’ ”

If this statement was attributed to me, the statement in the newspapers is erroneous. I have not said that your connection with the Michigan avenue case is unethical and unprofessional. In fact, I have made no comment upon your connection with this case, nor with any other. I have stated to the newspapers that I believe that any lawyer who formerly represented the city, and while in the employ of the city had anything to do, either directly or indirectly, with the Michigan avenue improvement or the legal steps necessary to pave the way for such improvement, should be debarred from representing any interests in the Michigan avenue improvement proceedings now pending in court, if appearing for any person or persons opposed to the improvement or to the interests of the city.

After consultation with the counsel actively in charge of the case for the city, it is my desire and purpose that a motion shall be made to this effect in open court. I do not hesitate to say that a basis for the foregoing belief and motion is afforded by numerous authorities, a memorandum of which has been prepared by this office. I desire to call to your attention the decision of the Supreme Court of Illinois in the case of *People v. Gerold*, 265 Ill. 448, in which the court used the following language:

“The rule has long been firmly established that an attorney cannot represent conflicting interests or under-

take to discharge inconsistent duties. When he has once been retained and received the confidence of a client he can not enter the service of those whose interests are adverse to that of his client or take employment in matters so closely related to those of his client or former client as in effect to be part thereof. (Weeks on Attorneys, 2d Ed., Secs. 120, 271; 1 Thornton on Attorneys, Sec. 174.) This rule is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties. He should undertake no adverse employment, no matter how honest may be his motives and intentions. (*Strong v. International Investment Union*, 183 Ill. 97.) He owes to his client fidelity, secrecy, diligence and skill and cannot take a reward from the other side. He is not, as a general rule, allowed to divulge information and secrets imparted to him by his client or acquired during their professional relation unless authorized to do so by the client himself. (*Hatch v. Fogarty*, 40 How. Pr. 492.) It is the glory of the legal profession that its fidelity to its clients can be depended upon; that a man may safely go to a lawyer and converse with him upon his rights in litigation with absolute assurance that that lawyer's tongue is tied from ever discussing it. (*United States v. Costen*, 38 Fed. Rep. 24.) This rule has been so strictly enforced that it has been held that an attorney, on terminating his employment, cannot thereafter act as counsel against his client in the same general matter, even though while acting for his former client he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment. (*Pierce v. Palmer*, Ann.

Cas. 1912b, (R. I.) 181, and cases cited in note.)''

There are numerous other authorities to the same effect.

If I have stated the contemplated motion too narrowly above, I reserve the right to broaden it as circumstances in my judgment may require.

Yours very truly,

SAMUEL A. ETTelson,
Corporation Counsel.

Presence of Drunkard in Dramshop.

October 2, 1916.

HON. OTTO KERNER, Chairman, Committee on Judiciary.

Dear Sir:

This is in reply to your request for an opinion as to the validity of a proposed ordinance which reads as follows:

*“Be it Ordained by the City Council
of the City of Chicago:*

“Section I. That it shall be unlawful for any minor, habitual drunkard, prostitute, or person convicted of felony, prostitution, or aiding and abetting prostitution to enter, or be in a saloon or dramshop in the City of Chicago.

“Section II. Any person violating any of the provisions of Section I hereof shall, upon conviction thereof be subject to a fine of not less than five dollars, nor more than two hundred dollars.

“Section III. This ordinance shall take effect and be in force from and after its passage and publication.”

We have not found any decision wherein the validity of an ordinance like, or substantially like, this proposed one has been passed upon. Of course, as you know state laws and ordinances are common which make it an offense to sell or give liquor to minors or habitual drunkards. But this proposed ordinance makes it an offense for any such persons, as those mentioned, to even enter or be in a saloon or dramshop. It seems to us that it would be unreasonable to make a saloon-keeper liable to a fine merely because some such person would enter or be in his saloon and, therefore, that this proposed ordinance would probably be held void for unreasonableness.

If, however, this proposed ordinance is intended to be directed against minors, habitual drunkards, prostitutes, or persons convicted of felony, and not against saloonkeepers, we are inclined to the opinion that it would be held to be void for indefiniteness, because such an intention is not adequately expressed. Furthermore, we are not prepared to say that the City Council can lawfully impose a fine upon a minor, habitual drunkard, prostitute, or person convicted of a felony,

for the mere entering or being in a saloon, regardless of the circumstances under which he or she may enter or be in such saloon.

Of course, a saloonkeeper may prevent any of such persons from entering or being in his saloon; but it seems to us to be at least doubtful whether the City Council can lawfully authorize the police and impose upon them the duty of arresting a minor, habitual drunkard, prostitute, or person convicted of a felony, for merely entering or being in a saloon and nothing more. But this seems to be speculative at this time in view of what we have before said as to the unreasonableness and indefiniteness of the proposed ordinance which we are considering.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Ordinance Relating to Cabarets and Decision of Supreme Court on Case Involving Dancing in Restaurants.

October 2, 1916.

HON. OTTO KERNER, Chairman, Committee on Judiciary.

Dear Sir:

We are in receipt of a communication from the city clerk stating that your committee desires an opinion as to the validity of a proposed ordinance now pending prohibiting cabaret performances in saloons and restaurants where intoxicating liquors are sold and that you also want our interpretation of the recent decision of the Supreme Court on the ordinance relating to dancing in restaurants.

We assume from the fact that the two requests come together and that your committee asked for the opinion after considering the decision of the court, that there is some question as to whether this decision has a bearing on the validity

of the proposed ordinance, and therefore we will first present our interpretation of the decision.

The case above referred to is known as *City of Chicago v. Drake Hotel Co.* It originated as one of a series of prosecutions against the proprietors of the leading hotels and restaurants for permitting their patrons to indulge in dancing in their restaurants while the same were open to the general public, contrary to Section 2 of the ordinance passed July 30, 1913. Twelve of these prosecutions were begun, involving such places as the Blackstone Hotel, Rector's, Vogelsang's, etc., all of them being regarded as respectable places, the case tried being the one affecting the restaurant in the Blackstone Hotel.

Section 2 of the ordinance in question reads as follows:

"Section 2. No person, firm or corporation, either as owner, lessee, manager, officer or agent of a restaurant or public place of refreshment conducted in any other place than a licensed dance hall, shall conduct a dance of the patrons therein or suffer or permit the patrons of same to indulge in dancing while the said place or the room in which the said dancing is indulged in is open to the general public as a place where the public may purchase refreshments."

It will be observed that the ordinance makes no distinction between places where liquors are sold and other places. Consequently, the powers of the City Council in this respect over places where liquors are sold was not involved. Neither was there involved in any of these cases the question of what the city could do in suppressing indecorous or immoral dancing or suppressing dancing in places where improper conduct of any kind was indulged in.

The whole case was fought out on the theory that there was nothing objectionable about the character of the place or the kind of dancing permitted, but that, since the ordinance included all public places of refreshment, even the most respectable must conform to its requirements. The city took the position that under Clause 41 of Section 1, Article V, of the Cities and Villages Act, it had the right to regulate public dancing as an amusement, that it had adopted as a

means of regulation a requirement that such dancing would not be permitted in such places unless a dance hall license was taken out under the provisions of the general ordinance relating to amusements. As against this contention it was claimed that such dancing was not an "amusement" within the meaning of the statute, that the ordinance was unreasonable, arbitrary and discriminatory, and the further point was made that the general ordinances relating to amusements contemplated licenses for only such of them as were operated for gain or for an admission fee, and that therefore there was no provision for licensing these restaurants as dance halls because they charged no fee and that the ordinance amounted to a prohibition of dancing in such places.

It was this last point that seemed to be the controlling factor in the decision of the court. In its opinion the court says that the ordinance, when considered alone and independent of other ordinances of the city, in effect prohibits dancing in restaurants which are not conducted in dance halls, and when it is construed with reference to the general amusement ordinances it is found that the provision for dance hall licenses does not apply because a dance hall license is intended only for places where the amusement is operated for gain, or an admission fee is charged.

The opinion of the court goes fully into the reasons why an absolute prohibition of dancing in restaurants is contrary to law and beyond the power of the Legislature itself, but it does not pass on the question of the right of the city to regulate such dancing nor on the question whether such dancing can be prohibited in restaurants and other places where liquor is sold. In other words, the court does not say what it would have held if the ordinance had provided directly for licensing restaurants and other public places of refreshment where dancing of the patrons is permitted instead of prohibiting it in case the place was not licensed as a dance hall, and the court does not say what its decision would have been if the ordinance related only to such restaurants and public places of refreshment as sold intoxicating liquors.

Turning now to the question of the validity of the pro-

posed cabaret ordinance, we find that this ordinance contemplates the prohibition of certain performances in saloons and restaurants where intoxicating liquors are sold. The prohibition being limited to only such places as sell liquor, it is plain that the opinion of the Supreme Court in the Drake Hotel Co. case has no application, and we therefore point to decisions that have long ago settled the law on the question involved.

In the case of *Schwuchow v. City of Chicago*, 68 Ill. 444, decided in 1873, it was held that inasmuch as the city was given power to regulate and prohibit the sale of liquor it could prohibit its sale absolutely or it could authorize its sale upon such terms and conditions short of prohibiting as it saw fit to impose.

Since then there have been many decisions of the Supreme and Appellate Courts of this state on questions relating to the powers of municipalities over the liquor traffic, but the courts have never receded from the position taken in the Schwuchow case.

Dennehy v. City of Chicago, 120 Ill. 627.

Malkan v. City of Chicago, 217 Ill. 471.

Wall v. Allen, 244 Ill. 456-462.

Harrison v. People, 124 Ill. App. 519-525.

Under the above authorities it is clearly within the power of the City Council to attach as a condition to the right to sell liquors the prohibition of such entertainments as are described in the proposed ordinance.

We suggest that in the part of the ordinance fixing the penalty the provision for revoking any restaurant license which a person who violates the ordinance may have should be eliminated.

This provision may be so construed that it will apply to a license for a restaurant run separately and independently from any dramshop which the owner may have. Under such circumstances there may be some doubt as to the right of the City Council to authorize the revocation of a restaurant license on account of a violation of an ordinance relating to dramshops. It may authorize the revocation of the dram-

shop license under which the place where the offense was committed operates, but such a restaurant license as indicated above stands on a different footing.

We also direct your attention to the concluding part of Section 2 beginning with the word "except." What is meant by the words "costumed otherwise than in ordinary attire?" Does that mean street clothes, evening dress, ordinary actor's outfit or something else? We think you should consider whether or not this language would not render the ordinance indefinite and, perhaps, discriminatory.

If the ordinance is changed so as to remove these doubtful features it will in our opinion be in such form that it cannot be successfully assailed.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Frontage Consent for Barrel Cleaning Establishment.

October 4, 1916.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your favor of September 27, forwarding us a protest against the issuance by your department of a building permit for the rebuilding or reconstruction of a barrel cleaning plant or cooperage to be conducted by Samuel Rosenblum at Nos. 1931 to 1941 Crystal street, together with a protest signed by certain residents in which they state that the Superior Court of Cook County had decided that the cooperage plant in question was a nuisance.

We have carefully considered all of the correspondence forwarded to this office, and have given the applicant for the permit, as well as the protestants, an opportunity to appear before us, represented by their attorneys, and to argue the questions that were raised before you by them.

Section 712 of The Chicago Code of 1911 as amended on November 8, 1915, provides as follows:

“712. FRONTAGE CONSENTS—GAS RESERVOIR—PACKING HOUSE—RENDERING PLANT—SOAP FACTORY—TANNERY—BLACKSMITH SHOP—FOUNDRY—SMELTER—METAL REFINERY—MACHINE SHOP—FACTORY, ETC.—LAUNDRY, ETC.—LIVERY STABLE—BOARDING STABLE—SALE STABLE—MEDICAL DISPENSARY — SECOND-HAND STORE OR YARD — SMOKE HOUSE.) It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building or place used for a gas reservoir, packing house, rendering plant, soap factory, tannery, blacksmith shop, foundry, smelter, metal refinery, machine shop, factory combined with a foundry, laundry to be run by machinery, livery stable, boarding stable, sale stable, medical dispensary, second-hand store or yard, smoke house or place where fish or meats are smoked or cured, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley. Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction or alteration of any building or place for any of the above purposes; provided, that in determining whether one-half of the buildings on both sides of the street are used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered.”

From the evidence presented to us it appears that the applicant for the permit is engaged in the business of buying barrels that have been used, and renovating and repairing them, if necessary, and then selling them to different purchasers. From a careful examination of the authorities, we are of the opinion that this business does not come within the purview of the section above quoted.

We, therefore, beg to advise you that, in our opinion, the applicant for a permit to reconstruct the cleaning plant or cooperage at 1931-1941 Crystal street is entitled to have a permit issued by your department without securing frontage consents.

We have examined the bill filed in the Superior Court of Cook County and the order entered at the hearing had thereon. We beg to advise you that, in our opinion, the protest filed with you and forwarded to us does not correctly state the facts. As we understand those proceedings, the Superior Court of Cook County has not decided that the business conducted by the applicant at the above address was a nuisance, but, on the contrary, we are forced to conclude that it was the opinion of the court that the said business could be conducted by the applicant without being a nuisance to the neighborhood.

Yours very truly,
 JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Establishing a Bureau of Waste Disposal.

October 9, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
 Dear Sir:

In reply to your letter of the 6th instant we beg to say:

1. We entertain no doubt that an ordinance, in proper form, creating a bureau in the Department of Public Works to be known as the "Bureau of Waste Disposal" would be valid.

As to the form, we call your attention to the analogous case of the Bureau of Compensation (Section 2098 of The Code of 1911) where the language used is as follows:

"There is hereby established a Bureau of Compensation, which bureau shall be under the direction and control of the commissioner of public works."

2. We perceive no legal objection to the ordinance prescribing that the title of the head of this bureau shall be "Mechanical Engineer in Charge." To include such head in the Department of Public Works the best way would probably be to amend Section 2063 of The Code of 1911.

3. The ordinance may properly prescribe the duties of the head of such bureau as it has done in the case of the city engineer (Sections 2083 and 2084 of The Code of 1911), the superintendent of streets (Sections 2085 and 2086 of The Code of 1911), the superintendent of the Bureau of Compensation (Sections 2098 and 2099 of the Code of 1911) and others similarly situated which it is not necessary to specify.

4. In our opinion, the City Council may prescribe the qualifications of the head of the Bureau of Waste Disposal, but such qualifications must be of a general character and not merely meant to describe a particular individual.

Thus (Section 2385 of The Code of 1911), the ordinance prescribes the duties of chief inspector of steam boilers as follows:

“The person so appointed shall be well qualified from practical experience in the design or construction and operation of boilers, generators and superheaters, and their appurtenances, used for generating steam for power, steaming or heating purposes, to enable him to judge of their safety for use as such, and shall be well qualified from practical experience in the design or construction and operation of all manufacturing houses, ice-making houses, cooling plants, refrigerators, packing houses, cold storage houses, chill rooms, freezers or any other factory or place wherein the piping, machinery or apparatus is under pressure, including boilers, tanks, jacketed kettles, generators, reservoirs and pipes used therein, and the apparatus connected therewith and the extensions thereunto, to enable him to judge of their safety for use as such.”

Again, Section 824 of The Code of 1911, before the title of the office was changed, prescribed the qualifications of the city electrician as follows:

“He shall be the head of said Department of Electricity and shall be a practical and skilled electrician, and shall not be engaged in any other business while acting in such capacity.”

While the boiler inspector and city electrician are appointed by the mayor with the advice and consent of the Council, still we believe that no distinction can properly be drawn on that ground so far as the power of the City Council

to prescribe the qualifications of the head of a bureau in a department is concerned.

5. As to the appointment of the head of such Bureau of Waste Disposal, we direct your attention to Section 2065 of The Code of 1911, which is as follows:

“Said commissioner shall appoint, according to law, all officers and employes in said department, and he may remove any such officer or employe, according to law.”

In our opinion, “according to law” in this section means, according to the law relating to civil service.

6. In our judgment, the City Council can not directly or indirectly, by designating the head of this department “Mechanical Engineer in charge” or in any other way, select or appoint the individual who is to occupy the position of head of the Bureau of Waste Disposal.

Very truly yours,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Expense of Re-Surfacing Streets.

October 20, 1916.

TO THE HONORABLE, THE CITY COUNCIL

OF THE CITY OF CHICAGO.

Gentlemen:

At the meeting of your honorable body on October 10th and 11th, 1916 (Council Journal, p. 1752), you directed the corporation counsel to furnish you with an opinion on the two following questions:

“1. In the resurfacing of streets now paved by macadam, brick, granite block, or other type of pavement, can the Board of Local Improvements assess one-half of the cost of such improvement on the abutting property or property benefited, and the balance against public benefits payable from the Vehicle Tax Fund?

“2. Can the city, under the above plan, as a part of the contract entered into by the contractor and the city, at its own expense furnish all or any part of the paving materials used in such street improvements?”

1. The first of these questions resolves itself into three different propositions: First, whether such resurfacing can be regarded as a new improvement over which the Board of Local Improvements has jurisdiction as distinguished from repair work over which the commissioner of public works has jurisdiction; second, whether the board has the right to divide the assessment in such a way that one-half will fall on the property owners and the remainder on the city for public benefits; third, whether the Vehicle Tax Fund is available for the purpose of paying such public benefits.

We are of the opinion that the complete resurfacing of an old pavement will generally be held to be a local improvement within the meaning of that term as used in the Constitution and in the statutes, and therefore within the jurisdiction of the Board of Local Improvements.

In *Field v. City of Chicago*, 198 Ill. 224, the court held that an ordinance providing that a macadamized roadbed shall be scraped, cleaned, filled and rolled so as to present an even surface, and that a new coating of macadam six and one-half inches thick shall be placed thereon, provides for a local improvement and not merely for repair of the street, and that it is not necessary to constitute a local improvement that the old material be entirely removed and replaced by material of a different character.

In the case of *Bush v. City of Peoria*, 215 Ill. 515, it was held that laying a new asphalt pavement after removing the old pavement down to the concrete foundation is not a matter of mere repairs, notwithstanding the old foundation is to be used for the new pavement after it has been partially renewed, and the court held that such work may be paid for by special assessment. The court says, on page 517:

“If the work authorized to be done by the ordinance here under consideration is that of maintenance and repair, the ordinance would necessarily be declared unreasonable, oppressive and invalid, for the reason that the

burden of maintaining and repairing the street cannot lawfully be imposed upon the owner of abutting property.

* * * A question of fact is therefore presented by this record whether the improvement ordered to be made is merely ordinary repair of the avenue or whether the work is that of re-construction or re-building. If the latter, the work is not to be regarded as merely that of repair. (24 Am. & Eng. Ency. of Law, 2d ed., 471, and authorities collected in note 2.)

"It is urged by counsel for the appellants that the pavement on the avenue is not worn out; that the surface is impaired, and that the work is only that of maintaining and repairing the surface and not an attempt to re-place a pavement that has been worn out; that fully eighty per cent of the asphalt upon the street is in good condition; that repairs are practicable, and that the asphalt now there would last for many years and that the cost of the repairs would be trifling compared with the total cost of re-surfacing; that the city has neglected its duty and allowed the street to get out of repair, and by this ordinance endeavors to repair it by re-surfacing it at the cost of the property owners.

"We find in the record evidence showing that the pavement was full of holes in the surface material; that the asphaltum was worn down from its original thickness of two and one-half inches to one-half inch in some places and to one inch in other places, making the surface of the roadway uneven; that it has age-cracks in many places and that the asphaltum had disintegrated in many different areas in both the wearing surface and the binder course, from which holes and breaks have extended through to the concrete foundation.

* * * * *

"In view of the testimony produced upon the hearing we would not be warranted in holding that the trial court erred in ruling that the work was not that of mere repairs. It was within the scope of the power possessed by the City Council to determine whether it was practicable to attempt to maintain the street by repairing it or whether a new pavement was required. The fact that the foundation on which the existing pavement had been laid was to be availed of as the foundation for the asphalt surface of the new pavement did not make the work necessarily one of repair only."

We have quoted freely from the above decision in order to point out that the question of whether or not an ordi-

nance under which resurfacing is to be done by the Board of Local Improvements will stand must depend on the facts and conditions in each individual instance. The remainder of our opinion will therefore be understood as relating only to such resurfacing of pavements as may properly be regarded as local improvements.

The question of whether the assessment in such a case may be divided so that one-half of the improvement will be paid for by special assessment on the private property benefited thereby and the remainder will be assessed against the city as public benefits depends largely on conditions. The apportionment of the cost between the public and the private property devolves in the first instance upon the superintendent of special assessments and is then subject to review by the trial court, whose decision is final.

The apportionment of the cost between the public and the private property is intended to be such a division as will be fair to all parties. The law confers no arbitrary power on the superintendent of special assessments to apportion the cost as he sees fit. Section 47 of the Local Improvement Act confers on the court the power to pass finally on the distribution of the cost of the improvement between the public and the private property. Any assessed property owner is permitted to urge that the amount assessed for public benefit shall be increased, and on principle it would seem that any taxpayer of the municipality would have the right to claim that the amount assessed for public benefit is excessive and should be reduced. The City Council is bound under the law to leave the matter of the apportionment of the cost to the discretion of the superintendent of special assessments, who in turn is obliged to follow the spirit of the law. There may be some cases where an apportionment of 50 per cent of the cost against private property and 50 per cent for public benefits might be proper, but we doubt the legality of any fixed rule to this effect, since the justice of the assessment in each case is to be ultimately determined by the court. Section 47 of the Local Improvement Act reads as follows:

“§47. Upon objection or motion for that purpose, the court in which said proceeding is pending may, in a

summary way, inquire whether the officer making the report has omitted any property benefited; also whether or not the assessment, as made and returned, is an equitable and just distribution of the cost of said improvement, first, between the public and the property; and second, among the parcels of property assessed. The court shall have the power, on such application being made, to revise and correct the assessment levied, to change or modify the distribution of the total cost between the public and property benefited, and also to change the manner of distribution among the parcels of private property, so as to produce a just and equitable assessment, considering the nature of the property assessed, and its capacity for immediate use of the improvement when completed. The court may either make such corrections or changes, or determine in general the manner in which the same shall be made, and refer the assessment roll to the person filing the same for revision and correction. The determination of the court as to the correctness of the distribution of the cost of the improvement between the public and the property to be assessed shall be conclusive, and not subject to review on appeal or writ of error."

From the above it must be clear to you that it is not within the power of either the City Council or the Board of Local Improvements to establish any fixed rule by which the assessment in all cases of resurfacing streets will be apportioned equally between the city and the private property.

While it is no part of our province to deal with questions of policy, yet we suggest that, so far as the benefits to be borne by private property are concerned, it is immaterial whether the public benefits are paid out of the vehicle tax or otherwise. Therefore, if in cases where the public benefits are to be paid out of the vehicle tax you establish a precedent that the public shall pay 50 per cent of the cost of the improvement you will practically be establishing a precedent in all local improvement cases, which, as we are advised by the Board of Local Improvements, will seriously embarrass them in their work and be apt to cause a very great burden upon the corporate fund.

With respect to the payment of public benefits of this kind out of the Vehicle Tax Fund, it is of course not within

the province of the Board of Local Improvements to say that public benefits shall be paid for out of any particular fund. The provision for payment must be made by the City Council when it passes its annual appropriation bill.

There is nothing in the statute which will prevent the City Council from appropriating money out of the Vehicle Tax Fund for the purpose of improving streets. The statute is framed so that the power to do this is plain. The clause in question reads as follows:

“Ninety-sixth. To direct, license and control all wagons and other vehicles conveying loads within the city, or any particular class of such wagons, and other vehicles, and prescribe the width and tire of the same, the license fee when collected to be kept as a separate fund and used only for paying the cost and expense of street or alley, improvement or repair.”

Sec. 1, Art. V, Cities and Villages Act.

If the City Council desires to use a part of this fund for the improvement of streets instead of using all for purposes of maintenance and repair it has the right to do so. It will, however, necessitate a change in Section 2719 of the code, since that now provides for use of all the money in the fund for purposes of maintenance and repair. If this section is amended so that only the remainder besides what is appropriated for the purpose of paying for public benefits where streets are improved under the Local Improvement Act is to be used for maintenance and repairs, in the manner set forth in the ordinance, the fund will be available for the payment of public benefits of this kind.

2. Taking up now the question of the city furnishing paving materials at its own expense in the making of such street improvements, we do not think this can be done if the city expects compensation for the material furnished. In case such compensation is to be secured for the city we apprehend that a serious difficulty exists which cannot be overcome without action by the state Legislature.

Section 74 of the Local Improvement Act provides that contracts for making local improvements shall be let to the lowest responsible bidder where they exceed \$500, and that

in case they do not exceed \$500 the city authorities may employ the necessary help and do the work, but the cost shall not exceed the lowest bid. Section 80 of the same act provides that the owners of a majority of the frontage may elect to take over the work at ten per cent less than the contract price and enter into a contract for same with the city authorities.

By virtue of these provisions it has been held that the property owners are entitled to have bids on the whole of the work that is included in the engineer's estimate which is the basis of the assessment, and the city can not assume a part of it and include its estimate of the cost of such part in the total cost of the improvement which is to be apportioned between the property owners and the city. In the case of *City of Hoopestown v. Smith*, 272 Ill. 604, the city undertook to furnish the drainage as its share of an improvement and to assess the entire cost of grading, curbing, graveling and paving against the property owners. The court said:

"It is also urged by appellants that the ordinance is invalid because it provides that the entire cost of grading, curbing, graveling and paving with brick shall be paid by special taxation and that the drainage shall be furnished and built by the City of Hoopeston, and makes no assessment against the city. We think this objection should be sustained. The drainage described in said ordinance is a component part of the improvement as shown by the ordinance. The improvement would not be complete without the catch-basins and the inlets, etc., provided for the drainage thereof. As the drainage provided for in said ordinance was a necessary and essential part of said improvement the city had no right to treat it as a severable part of the improvement, and as one that could be built by it without first advertising and receiving bids for the construction of the work. The city cannot build any improvement or any part thereof, whether it costs less or more than \$500, without complying with Section 74 of the Local Improvement Act. That section does not authorize a city or village to perform the work and employ the necessary help for any improvement without first having received bids therefor as in said section provided, and then only when, after receiving bids, it shall appear to the Board of Local Improvements that

said work can be performed better and cheaper by the city, town or village or the authorities thereof and when the work will not cost more than \$500.

“By Section 80 of the Local Improvement Act the owners of a majority of the frontage of the lots and lands abutting on the improvement have a right to elect to do the work for the whole improvement and enter into a contract therefor at ten per cent less than the price at which the same shall be awarded to the lowest bidder. The abutting owners therefore had the right to have all the component parts of the improvement described and estimated.”

City of Hoopestown v. Smith, 272 Ill. 604, 607-8.

The rule laid down in the above case would undoubtedly be invoked in case the city undertook to furnish its own paving material and seek to obtain credit therefor either as a part of its contribution for public benefits or through the letting of the work with a provision for the use of such materials by the contractor.

It may be that the city could furnish the material or a part thereof necessary for a public improvement, and then receive bids for the work and the remainder of the material required for the improvement, and treat the cost of the labor and of the material not furnished by the city as the cost of the improvement and have an assessment spread on that basis. But in that event the city would receive no credit for the materials furnished by it. We are not advised that your Honorable Body has in mind the making of any such arrangement as that just above suggested, and therefore we refrain from expressing an opinion upon that subject.

Very truly yours,

LEON HORNSTEIN,
EUGENE H. DUPEE,
Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Stenciling or Painting Advertisements on Sidewalks.

October 21, 1916.

DR. JAMES W. WALKER, 1504 E. 53rd street, Chicago, Illinois.

Dear Sir:

We are in receipt of your communication of September 18th, asking us to inform you if there is an existing city ordinance prohibiting stenciling of advertisements with paint on our sidewalks. In reply we beg to advise you as follows:

"The public streets of a city are dedicated to the public for public use, subject to the control of the City Council; but that body must hold them in trust for the public, and has no power to alien or otherwise encumber them for private use."

Hibbard, Spencer, Bartlett & Co. v. The City, et al.,
173 Ill. 91.

"A sidewalk in a city, though devoted to the use of pedestrians, is nevertheless a portion of a public highway, as much so as the street. They are both free to be properly used and enjoyed by the entire public, and are constructed alike for their use."

The City v. O'Brien, 111 Ill. 532;

Lester v. Durham Traction Co., 1 L. R. A. (N. S.),
981, 985;

State v. Jackman, 42 L. R. A. 438, 440;

City of Chicago v. Noonan, 121 Ill. App. 185;

Farson v. Fogg, 205 Ill. 326, 340.

After careful perusal of the authorities, we are of the opinion that it is unlawful to stencil sidewalks of the city with paint; that is an improper and unlawful use of the same.

The ordinances provide that "the corporation counsel shall, when required so to do, furnish written opinions upon subjects submitted to him by the mayor, the City Council or the head of any department," so you will see that this is not an official opinion but is merely our best information as a matter of courtesy.

Very truly yours,

ALBERT FINK,

Approved: Assistant Corporation Counsel.

SAMUEL A. ETTELSON,
Corporation Counsel.

Frontage Consents.

October 23, 1916.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We are in receipt of your communication of September 26, in re request of the Committee on Judiciary for advice regarding the sufficiency of the language of Section 712 of The Chicago Code of 1911 to prohibit the establishment and operation without frontage consents of any of the classes of business therein referred to in an existing building which is adaptable to the needs of such business without alteration of any kind, and further desiring information as to whether it would be possible to amend the section in such manner as to make it more positive in its application to the operation of the business in existing buildings.

Section 712 as it now stands reads as follows:

“712. FRONTAGE CONSENTS—GAS RESERVOIR—PACKING HOUSE—RENDERING PLANT—SOAP FACTORY—TANNERY—BLACKSMITH SHOP—FOUNDRY—SMELTER—METAL REFINERY—MACHINE SHOP—FACTORY, ETC.—LAUNDRY, ETC.—LIVERY STABLE—BOARDING STABLE—SALE STABLE—MEDICAL DISPENSARY—SECOND-HAND STORE OR YARD—SMOKE HOUSE.) It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building or place used for a gas reservoir, packing house, rendering plant, soap factory, tannery, blacksmith shop, foundry, smelter, metal refinery, machine shop, factory combined with a foundry, laundry to be run by machinery, livery stable, boarding stable, sale stable, medical dispensary, second-hand store or yard, smoke house or place where fish or meats are smoked or cured, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley. Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction or alteration of any building or place for any of the above purposes; provided, that in determining whether one-half of the buildings on both sides

of the street are used exclusively for residence purposes any building fronting upon another street and located upon a corner lot shall not be considered."

You will observe that the language used therein is as follows:

"locate, build, construct or maintain."

These words are sufficient to prohibit the establishment and operation without frontage consents of any of the classes of business referred to in such section in an existing building which is adaptable to the needs of such business without alteration of any kind, and we do not think that it would be necessary to amend the said section in order to make it more positive in its application to the operation of such prohibited business in existing buildings.

Yours very truly,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Removal of Ashes from Buildings Containing Five or more Flats.

October 24, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We are in receipt of a request for an opinion from the Bureau of Streets relative to the removal of ashes from buildings which have heretofore not had the benefit of the city's service. The reason for this inquiry, it is stated, is that a great number of requests have been made for such service on account of the recent decision of Judge Walker to the effect that the city is obliged to remove ashes from all residential buildings or have the present ordinance amended.

In reply, we beg to state that it would be premature at this time to change from the course that has been pursued for years in regard to this branch of the bureau's activity. Judge Walker has not made a final decision in the case before

him, but only went so far as to overrule a demurrer interposed by the city to a petition seeking to compel the commissioner of public works to remove ashes from all residential buildings. It is true that in making this ruling the court expressed an opinion as to how the ordinance (Section 1000) is to be interpreted, which, if adhered to finally, would require you to extend the service to the larger flat buildings, but in view of the fact that the whole subject matter is now pending before the Supreme Court and the case before Judge Walker will probably not be decided until the Supreme Court has passed on the case before it, we see no reason for taking notice of the requests or demands made on you by persons who are not parties to either of the said proceedings.

Up to the present time the city has the best of the argument on the points raised. The Supreme Court in the case of *People ex rel. Webster v. City of Chicago*, 272 Ill. 451, brought by the same attorney and involving precisely the same issues as the case before Judge Walker, decided that the duty of removing ashes from a building was primarily on the owner and that there was no ordinance which required the city to remove ashes from any building. While this decision is right in line with the contention of the city, it was not final on the point raised to the effect that the appropriation must be expended in such a way as to serve all owners of residential property alike. As to this point, the court held that the appeal had not properly come before it, and remanded the case to the Appellate Court. The latter court held with the city on all points, construed the ordinances in question as they had been interpreted heretofore, and held that neither the appropriation nor the levying and collecting of a tax for the removal of ashes imposed any duty or obligation on the city to remove ashes from all residence property in the city.

From this decision of the Appellate Court the petitioner again appealed to the Supreme Court, where the case has been argued and has been taken under advisement by the court. If the Supreme Court sustains the Appellate Court the case before Judge Walker would have to be decided in favor of the city.

It is not necessary to go into further details while the matter is in this condition, but in order that you may understand our position in regard to Sections 995 and 1000 of the code we will add that our contention in regard to Section 995, requiring separate vessels for garbage and ashes in all buildings where persons reside, is that it relates to vessels for garbage and ashes for domestic purposes as distinguished from the provision for removing ashes at the owner's expense from the heating plant of the building, which is governed by Section 1000. This is demonstrated by the language employed generally in the two sections and by the provision in Section 1000 which prohibits the owner of a heating plant from using "in connection with said building or portion thereof any vessel for ashes and miscellaneous waste provided for domestic use." The very proviso which is the basis for the adverse contention seems to be conclusive on this point. It reads as follows:

"Provided, this section shall not apply to any case where a vessel or vessels for ashes are required by the provisions of Section 995 of this article, nor apply to any building containing less than five flats."

The only interpretation which can be accorded to this proviso is that the requirement for removing ashes shall not apply to ashes in vessels for domestic use as provided for in Section 995 and that it shall not apply even in the case of the heating plant in buildings containing less than five flats. If that were not the proper interpretation the word "nor" would have no meaning whatever and the whole phrase beginning with that word would be superfluous.

We are therefore of the opinion that you are not bound, for the present, to give heed to demands for the removal of ashes except as you have done heretofore.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

NOTE: After the above was written the Supreme Court decided the pending case in favor of the city. (*City of Chicago v.*, Ill.)

Lease of Municipal Portable Asphalt Plant.

October 24, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

Replying to your letter of this date in which you ask to be advised as to whether or not there are any legal reasons why the city cannot lease the city portable asphalt plant located at Cicero and Wilson avenues, which has been shut down for the season, to enable the lessees to finish their contracts for paving before the winter sets in, we beg to say we are of the opinion, that the city can legally do this, provided that by such lease the city is to be paid adequate compensation for the use of such plant, and provided, further, that the city itself has no use for such plant during the times it is so leased.

We think the power of the city to lease such plant, under the conditions mentioned, is sustained by the following authorities:

Dillon on Mun. Corp., Section 997, page 1593, and cases cited,

3 McQuillin on Mun. Corp., Section 1145, page 2521 and cases cited.

Very truly yours,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Publication of Ordinances Which the Statutes Do Not Require to Be Published.

October 27, 1916.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

In your letter of recent date you state that many ordinances passed by the City Council which are not required by statute to be published before becoming effective contain a

provision that they shall take effect from and after their passage and approval "and due publication", and you ask whether publication in the pamphlet containing the proceedings of the City Council constitutes "due publication" within the meaning of the term as used in such ordinances.

The City Council has it within its power to put off the time of taking effect of any ordinance and to provide that it shall only take effect upon the happening of a certain contingency. The statute provides that all other ordinances besides those that must be published "shall take effect from and after their passage, unless otherwise provided therein". (Art. V., Sec. 3, Cities and Villages Act.) The rule is stated by Dillon as follows:

"Municipal ordinances, otherwise valid, may, like an act of the legislature, be adopted to take effect in the future upon the happening of a contingent event."

Dillon on Mun. Corp., 5th Ed., Sec. 575.

Following this rule, the City Council passes many ordinances which do not take effect unless accepted, others which do not take effect until approved by the voters, etc. The provision to which you refer is one which must be observed whenever it appears in an ordinance even if the ordinance is not of the kind which the Cities and Villages Act requires to be published, and it must be construed in such a way as to carry out the intent of the City Council.

In *Downers Grove v. Findlay*, 237 Ill. 368, the court passed on a special assessment ordinance which provided that it should take effect "from and after its passage, approval and publication." The court said:

"The estimated cost of the improvement was a little less than \$100,000, and the ordinance did not come within the provision of Section 11 of the Local Improvement Act, requiring publication in the proceedings of the board of trustees before its passage. It did not impose any fine, penalty, imprisonment or forfeiture or make any appropriation, and therefore did not come under the provision of Section 3, Article 5, of the City and Village Act, requiring publication within one month after passage, but it was within the provision of that section that all other ordinances shall take effect from and after their

passage, unless otherwise provided therein. It was otherwise provided and the ordinance was not to take effect until the publication. * * *''

Downers Grove v. Findlay, 237 Ill. 368.

In fixing the time for the taking effect of ordinances which, by the terms of the charter, must be published before they can become laws, the City Council almost invariably uses the words "due publication". There can be no doubt as to the meaning of the words when so used, and therefore it can hardly be assumed that the Council means something else when it uses the same words in the ordinances to which you refer. Among the means of interpreting legislative enactments is to search other acts of the same body for the precise words used and determine the meaning of the doubtful word or phrase by analogy. Here we have the same language used in both classes of ordinances in exactly the same way, and the intent of the Council is therefore clear. The Council intends that there shall be such a publication as will be sufficient under the law to put it into effect.

Nor can it be assumed that the ordinance which must be published by order of the City Council is sufficiently published if printed in the Council Journal if such publication is not sufficient in the case of an ordinance which must be published under the statute. The intention of the Council is that it shall be published in such a way that if it came within the class required to be published by the charter there would be a sufficient publication.

In the case of *Bullis v. City of Chicago*, 235 Ill. 472, there was introduced in evidence at the time of the trial an order or resolution which appeared in the pamphlet containing the proceedings of the City Council. The court said of this:

"So far as appears, the resolution was never approved by the mayor. Even if it had been in the form of an ordinance, the pamphlet in which it was contained did not purport to be a publication of the ordinance by authority of the City Council. It was merely the official record of proceedings of the City Council meeting of January 5, 1903. The statute has not made the published

proceedings of the City Council evidence of the existence of an ordinance.”

Bullis v. City of Chicago, 235 Ill. 472, 478.

It is possible that, by printing a statement on the title page of each of the pamphlets containing the proceedings of the City Council to the effect that the same is published by authority of the City Council, the pamphlet might then be considered as within the provision of the statute that “when printed in book or pamphlet form and purporting to be published by authority of the City Council”, ordinances need not be otherwise published, but even that is doubtful.

Under the circumstances “due publication” in the case of penal ordinances, etc., must be held to be a publication in a newspaper published in the city; and in the case of other ordinances the words must be understood to have a like import.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Coal Delivered to City in Anticipation of Strike.

November 3, 1916.

HON. W. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

The question of the propriety of making payment to the Wilcoxson Coal Company for coal delivered to the city and used by it which was ordered in contemplation of the threatened railway strike has come up on account of a letter from the city engineer, which refers to a claim of another coal company whose product was not accepted by the city.

At the time the matter was up before, the undersigned advised the acceptance of the coal from the Wilcoxson Coal Company for the reasons given below, the facts being as follows:

On August 31, 1916, in response to requests for such bid the Wilcoxson Coal and Coke Company submitted a proposal of which the first paragraph read as follows:

"We agree to furnish you coal for pumping stations use in the City of Chicago not later than 7 a. m., Monday, September 4, 1916, thirteen (13) cars of 1 $\frac{1}{4}$ "x6" egg and 1 $\frac{1}{4}$ "x3" nut coal (this coal is now in transit to Chicago), at a price of \$1.60 mines plus an 82 cents freight rate, making a total cost of \$2.42 delivered on board cars at any team or industrial track designated by you, this coal to come from the Riverton and Sangamon mines in the Springfield district."

Only one car out of the thirteen so offered to the city was placed on the switch track on Monday, September 4th. The balance of the cars were reported at that time in the hands of the Belt Railroad in the City of Chicago. Thereupon, the city engineer took up with the writer the question of whether or not the agreement of this company had been complied with as to delivery, and a verbal opinion was given to the city engineer to the effect that there was grave doubt whether the proposal would be held to mean that the coal contracted for was to be on the switch tracks at the time specified. The company stated that it agreed to furnish the coal "for pumping station use in the City of Chicago" at a certain time, and at a certain price, plus the freight rate and then stated that this would make "a total cost of \$2.42 delivered on board cars at any team or industrial track designated."

While we are not disposed to say that the city would have been absolutely foreclosed from claiming that the proposal contemplated the delivery on the team tracks on September 4th at 7 a. m., there was enough doubt about the proposition to make it advisable to accept this coal, which the city engineer stated could be used to good advantage by the city, and was offered at a price that was not excessive. Consequently, the coal was accepted and used.

It was deemed advisable, however, in view of all the circumstances, and especially in view of the fact that this coal had not been regularly contracted for through com-

petitive bidding, that there should be Council action authorizing payment. Pursuant to this, the matter was presented to the City Council and on October 23, 1916, an order was passed authorizing the Commissioner of Public Works to pay for the coal thus delivered by the Wilcoxson Coal and Coke Company (Council Journal, page 1970). Under these circumstances we see no reason whatever why payment should be withheld.

The city engineer states that the question has been raised whether the city will place itself under any liability on account of some claims of another coal company whose product was not accepted by the city.

In answer to this we beg to advise you that the mere fact that the city settles in this way with the Wilcoxson Coal and Coke Company would not create a precedent which would be binding in favor of another coal company somewhat or, perhaps, exactly similarly situated. The settlement with one party cannot be taken advantage of by another party who has a similar claim, except in so far as it can be used as an argument to induce the City Council to take similar action in its case.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Purchases of Asphalt in the Open Market to Take Care of
Deficiency Caused by Default of Contractor.**

November 7, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We rely upon the letter of the superintendent of streets dated October 4, 1916, and the letter to you from the First assistant superintendent of streets dated October 2, 1916, copies of which letters are hereto attached, as correctly stating the pertinent facts as follows:

That in due form and after proper advertisement the Atlantic Refining Company of Philadelphia contracted to supply the city with refined asphalt.

That such contract, among other things, contained a provision to the effect that if at any time in the opinion of the commissioner of public works the Atlantic Refining Company, not being hindered by natural causes beyond its control, should fail to furnish and deliver the material contracted for in accordance with the specifications, the commissioner of public works might suspend the contract or declare the same forfeited and re-let the same, *or he might purchase the material in the open market and deduct the difference between the cost of such material and the price agreed upon from moneys that might be due or become due to the Atlantic Refining Company, and if there would not be a sufficient amount available for the purpose, then such amount as might become due under the terms of the contract could be recovered by the city from the Atlantic Refining Company.*

That such contract is still in force, not having been abandoned or canceled, and that the Atlantic Refining Company is continuing to make deliveries thereunder.

But that such deliveries are materially short, both in quantity and quality, of what the contract calls for; the Atlantic Refining Company not being excused in this respect by being hindered by natural causes beyond its control.

Assuming the facts to be as above outlined, and as applied to the situation so presented, it is our opinion that the provision of the contract above referred to is valid, viz: That the commissioner of public works may purchase the deficiency in material in the open market and deduct the difference between the cost of such material and the price agreed upon from moneys that may be due or may become due to the Atlantic Refining Company, and that if there is not a sufficient amount available for that purpose, then such amount as may become due under the terms of the contract can be recovered by the city from the Atlantic Refining Company and its surety.

You will observe that this opinion is narrowly limited to the precise case presented. It should not be extended or applied to cases where contracts have been abandoned or canceled or re-let as new contracts, or to any other case save only the precise case so presented as above stated.

However, before proceeding to make such purchases we think that you should give the Atlantic Refining Company reasonable notice that it must comply with the requirements of its contract and that otherwise you will purchase the asphalt on the open market and charge the cost of the same against that company.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A ETTELSON,

Corporation Counsel.

Condemnation of Land for Bridge Approach.

November 8, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.

Dear Sir:

We acknowledge receipt of your letter of the 3d inst., and in reply thereto we beg to say that, in our opinion the necessary land on the west side of the canal, as shown on the blueprint accompanying your letter, can be condemned for necessary temporary use in connection with building the permanent bridge at Lawrence avenue.

2 Lewis Eminent Domain (3d Ed., Sec. 452).

Epburn v. Jersey City, 67 N. J. Law 114.

Wheelock v. Young, 4 Wend. 647.

We do not consider the case of *Currier v. Marietta and Cincinnati Railroad Company*, 11 Ohio St. 228, conflicts with the other authorities above cited.

We have referred this matter to Assistant Corporation

Counsel Dahlberg and if you will take the matter up with him, he will promptly institute appropriate proceedings.

Yours very truly,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Issuance of Duplicate for Lost Bond.

November 9, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter in reference to the application for the issuance of a duplicate bond to cover one destroyed by fire was referred to the undersigned.

It appears from your letter that the lost bond is one of small denomination (\$100), and that the owner is a person of limited means to whom the loss amounts to a great deal; and you ask whether the matter can be so handled as to accommodate the owner without making the city responsible. On further inquiry we learn that you have means of ascertaining the number of the bond and the issue, date, etc., so that if the duplicate bond and coupons are issued you can readily discover any fraud that may be practiced in regard to the collection of the proceeds of same.

The law with respect to such a situation is that the loss or destruction of a written instrument in no way affects the liabilities of the parties to it or changes the nature of the demand. (25 Cyc. 1608.) In other words, if the destruction of the instrument by fire can be absolutely proven, the owner could demand payment the same as if he produced the document and would have the right to enforce such demand. In fact, if such a party proceeded properly in a court of chancery the court would decree the execution of a new instrument. (*Bennett v. Waller*, 23 Ill. 97; *Morrison v. Morrison*, 140 Ill. 560-568.)

On the other hand the law contemplates that the party who is likely to suffer loss in the case of the production of the lost instrument by parties not the owners of same should be amply protected; and if the party demands it a court will compel a person bringing suit on a lost instrument to give indemnity before it enters judgment. (25 Cyc. 1615.)

In the present instance the amount involved is too small to compel the owner to go into court, and we believe the city can be protected against loss by an indemnity bond with a good surety on same.

We suggest that you require this party to give an indemnity bond covering the amount of the lost bond and unpaid interest. The surety ought to be an accredited surety company, since the bond will have to remain in force a long time. When this is done copies of the lost bond and interest coupons can be made with notations on same showing that they are duplicates and issued in place of the originals, and those may be turned over to the owner who can then collect on same as they mature. In case the originals should at any time appear, payment can be stopped on the originals or duplicates or both as the justice of the case may require.

Before using this as a precedent in other cases please confer with this office.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Advancement of Money for Payment of Judgments in 12th
Street Widening.**

November 10, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You referred to this department copies of receipts to be signed by the Board of Local Improvements and the city

comptroller respectively for the purpose of securing money out of certain funds in the hands of the city treasurer in order to pay condemnation judgments awarded in the proceeding for the widening of Twelfth street, and you ask to be informed as to the exact purpose of this transaction and as to the legal sufficiency of the receipts and the ordinance of July 10, 1916, in protecting the city and the comptroller from liability in making these payments.

The action of the City Council was taken in pursuance of an act passed at a special session of the Legislature of the state on December 3, 1915, which became effective July 1, 1916. This act amended Section 1 of the act concerning municipal funds under which advances of a similar nature have been made for a number of years on tax anticipation warrants.

That part of said Section 1 which relates to the matter in question reads as follows:

“That any city having a population of two hundred thousand (200,000) or more by the last preceding census of the United States or of this state, holding in its treasury any fund set aside for use for some particular purpose that is not immediately necessary for such purpose may at any time prior to July 1, 1920, but not thereafter unless hereafter authorized by law so to do, by ordinance of the City Council of such city, advance the money in such fund, or such part thereof as may be required, to the board of local improvements of such city, to be applied by such board toward the payment of any final judgment or judgments of condemnation rendered in any proceeding involving the taking or damaging of private property for a local improvement of such city, the cost of which is to be defrayed wholly or in part by special assessment or special taxation, such advance not to exceed fifty per cent of such special assessment or special tax. Before any money shall be paid out upon such advance the City Council shall by the same ordinance require such board of local improvements to make or execute and deposit with the city comptroller of such city, who shall give a receipt in writing therefor, a pledge or security in writing to the entire extent of such special assessment or special tax, for the repayment of such advance out of the proceeds of such special assessment or special tax. In such event, all moneys paid on account of such special as-

assessment or special tax shall at once be credited to and placed in such fund until the same is reimbursed for the advance made therefrom and the entire amount of such advance shall be repaid to such fund within three years from the date of passage of such ordinance, and thereupon the City Council may by ordinance cancel and release such pledge. Such advance shall bear interest at the rate of four per cent per annum and before making the same the City Council shall make provision for the payment of such interest out of any corporate funds legally available for the same."

It will be observed that the provision for making advances under this new act is practically the same as in the case of making advances on tax anticipation warrants; that the act requires certain formalities in the way of a pledge on the part of the Board of Local Improvements and a receipt therefor by the city comptroller.

Provision is made for repayment by the act itself, independent of such pledge and receipt, and in one sense of the word the pledge and receipt do not add to the security or guarantee more prompt payment; nevertheless the statute must be followed.

The City Council in pursuance of said act passed an ordinance on July 10, 1916 (Council Journal, pp. 1327-1329, inclusive) in which it authorized the city comptroller and city treasurer to advance money for the purpose of paying condemnation judgments in the proceeding for the widening of Twelfth street upon the pledge provided for by statute being made, and designated the various funds from which such advances can be made. The ordinance closely follows the statute and authorizes advances only to the extent of fifty per cent of the amount levied as a special assessment against private property benefited by the local improvement. Said ordinance was drafted in the department of law, and we are of the opinion that its provisions cover adequately all that is required by statute, and that it protects the officers of the city who are involved in the transaction. The pledge and receipt were also drafted in the department of law and they have been approved as to form. We recommend that when they are finally exchanged, as required by the statute and the

ordinance passed in pursuance of same, the approval of the corporation counsel be added thereto, so that no question can arise as to proper signatures, inasmuch as the ordinance expressly says that the same shall be approved by the corporation counsel.

We have taken pains to follow the statute as much as possible so far as the wording is concerned in all these documents, and are satisfied that the advances can be made without danger to any one concerned, and that the city and city comptroller are protected from liability in making the payments provided for.

We return herewith copy of letter from the corporation counsel, also copies of the pledge and receipt which you submitted to us.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right of Pensioner Who Has Not Served Full Time.

November 14, 1916.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of the application of Sadie M. Hogan, widow of Patrolman William J. Hogan, for a pension, together with your request for an opinion as to her rights to the same, owing to the fact that the said William J. Hogan served in the Police Department as a patrolman for a period of only nine years, one month and seven days.

In reply, we beg to advise you that an examination of the records of the Police Department discloses the fact that the said William J. Hogan was appointed as a driver in the Police Department on June 28, 1897, and remained in the service up to the time of his death, September 22, 1916.

Section 7 of an act entitled "An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities having a population exceeding two hundred thousand inhabitants," provides as follows:

"§ 7. Wheresoever the word 'policeman,' as used in this act appears, the same shall be interpreted and construed to include and to mean the following:

"Any person who has been appointed and sworn or designated by law as a policeman, prior to the taking effect of this act, and has served in a regularly constituted police department as a policeman, or police patrol driver and police operator and a member of the police force thereof, and contributed to the Police Pension Fund for such time as he has been in the services of such police department as a policeman, or police patrol driver and police operator, the intention being that all policemen, or police patrol drivers and police operators who have so contributed to the Police Pension Fund (their widows and children entitled thereto) shall be entitled to any of the benefits of any pension law in force and effect when this act, in cities within its terms, shall supersede an act entitled, 'An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities, villages and incorporated towns.' (Approved April 29, 1887, in force July 1, 1887) as subsequently amended."

In view of the clear provisions of the above section, it is quite apparent to us that it was the intention of the General Assembly that drivers in the Police Department in the City of Chicago who contributed to the Police Pension Fund should be considered as policemen within the meaning of the Pension Fund Act and that they are entitled to credit as policemen for any time they may have served in the department as drivers.

We, therefore, recommend that the application of Sadie M. Hogan for a pension be acted upon favorably by your board, and that she be granted a pension.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Reports from Cold Storage Warehouses to Commissioner of Health.

Chicago, November 16, 1916.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether the Department of Health can require cold storage warehousemen to furnish at this time a complete inventory of all commodities stored in their cold storage warehouses in this city, and asking what method of procedure shall be followed where such information is refused upon request.

The only law which can be invoked for the purpose of compelling cold storage warehousemen to make such reports is the provision contained in Section 6 of the ordinance regulating cold storage warehouses, passed by the City Council on December 9, 1912. (Council Journal, pp. 2662-4.) Said section is as follows:

“Section 6. Every person, firm or corporation engaged in the business of cold storage warehouseman, or in the business of refrigerating, or in any business in which articles of food as defined herein are kept in cold storage for any purpose whatsoever, shall submit reports to the Department of Health upon printed forms to be provided by said Department of Health, setting forth in itemized particulars the quantity of each and every food-stuff in storage or in the control of said person, firm or corporation; such report shall be filed on or before the twenty-fifth (25th) day of January, May and September of each year, and reports so rendered shall show the true conditions in regard to such matters existing in said cold storage warehouse or place of cold storage upon the first day of the month in which said report is filed.”

Under the above section and the penalty provided in Section 9 of the same ordinance you would, if the necessary preliminaries had been observed, have the right to prosecute any cold storage warehouseman who failed to make a report of the conditions as to quantities in storage on September 1st in the manner prescribed by the 25th of September. The

ordinance, however, presupposes that you will prepare printed forms for this purpose; and while there may be doubt as to the necessity of forwarding same to the cold storage warehousemen, it contemplates that you should at least have them ready for the party desiring to make such report so that he can obtain them on application. The point that can be made on this is that the ordinance does not simply require a report, but requires a report upon printed forms to be provided by you. In other words, the warehouseman would not fulfill the provisions of the law unless he made his report on such a form. Your right to prosecute therefore depends on whether or not you had printed forms ready for the purpose prior to September 25th.

In case you were prepared to furnish the printed forms as above indicated and are now in a position to prosecute for failure to make reports, you would have the right, in the exercise of your discretion, to waive prosecution on condition that a report which will contain substantially the information you are entitled to is made at the present time. You would not have the right to compel a report showing quantities on hand at the present time, except as to particular kinds of food which on inspection for special reasons may be open to objection on account of matters which concern the public health. The most you could demand would be a report showing quantities on September 1st.

To illustrate: You have the right, as chief health officer of the city, in case you make an inspection which discloses that eggs are in a condition unfit for consumption, to demand a report showing the quantity on hand, the time they were placed in storage, etc. (See Sections 1363 and 1364 of The Chicago Code of 1911.) But if you have no information which indicates that there is any unfit or unwholesome food in storage in such a place, you cannot call for a report as of this date, but as of September 1st—and then only in case you had the blank forms as above set forth.

The next date for making a report occurs after January 1st and not later than January 25th, and the report should show the quantities on hand January 1st. In order to be in a

position to prosecute for failure to make such report it will be necessary for you to have the printed forms ready on January 1st or at the latest a few days thereafter. Inasmuch as these reports have not been demanded heretofore, we recommend that if you prepare to prosecute after January 25th notice should be given and blank forms furnished to the parties involved prior to January 1st.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Making of Leases Before January 1, 1917.

November 20, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

The City's real estate agent has submitted for approval the form of a council order which contemplates that the comptroller be authorized, prior to the passage of the Appropriation Bill for 1917, to enter into leases on behalf of the city for terms not exceeding two years.

The form of the order is not objectionable, and, if passed by the City Council after the beginning of the fiscal year and before the passage of the Appropriation Bill would bind the city if leases were made in pursuance thereof.

City of Danville v. Danville Water Co., 180 Ill. 235.

We are of the opinion, however, that the passage of such an order before January 1, 1917, would not authorize you to enter into leases on behalf of the city if there is no previous appropriation on which you can draw for the purpose, even though no money were to become due thereunder until next year.

Section 36 of The Chicago Code of 1911 authorizes the comptroller, without the special approval of the City Council, to execute leases of real property for the city whenever he shall find it necessary to secure private property for the use of the city or deems it advisable to rent property of the city to others, such leases not to run for more than two years. But this provision must be construed in connection with Section 4 of Article VII of the Cities and Villages Act, which prohibits the making of a contract by the City Council or the incurring of expense by any officer of the city without an antecedent appropriation.

While it might be argued that the strict letter of the statute only prohibits you from incurring an expense and that it is possible to so draw the lease that an expense would accrue only when an appropriation is made, nevertheless the making of the lease would probably be construed as contrary to the spirit and intent of the statute. In any event, the proposed action of the City Council would amount to authorizing the making of a contract, and this would be contrary to the statute.

This section of the statute has been held in the case cited above to apply in all cases except during that period of the first quarter of the fiscal year which precedes the passage of the annual appropriation ordinance, during which period the City Council may authorize the making of contracts and later on include an appropriation for same in the appropriation ordinance.

We are therefore constrained to hold that the passage by the Council of such an order as you have submitted would not add to your powers unless it was passed after January 1 and before the passage of the annual appropriation bill.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Award of Contract to Lowest Responsible Bidder.

November 23, 1916.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your request for an opinion as to whether it will be necessary to divide the contract for furnishing the wood furniture at the Municipal Contagious Disease Hospital and award the same to the lowest bidder in each of two groups in order to conform to the law, or whether you can award such contract to the bidder whose aggregate bid is the lowest but who is not the lowest in either of the two groups.

From the facts presented by you it appears that there are five bidders who complied with all the necessary formalities and whose bids had to be considered in making the award; that each of these bidders is a concern of high financial standing and amply able to handle the contract.

It appears further that the bids were called for in such a way that all bidders made separate bids for the goods under Group "A" and Group "C" respectively; that Carson, Pirie, Scott & Company were the low bidders for Group "A," their price being \$1,328; that John V. Farwell & Company were the lowest bidders for Group "C," their bid being \$3,780.45; that Marshall Field & Company bid \$1,384 on Group "A" and \$3,817.75 on Group "C," and that by adding the two together they are the lowest bidders in the aggregate, but are about \$100 higher than in case the contract was awarded to the lowest bidders for the separate groups.

You now state that it would be desirable to award the contract to Marshall Field & Company for two reasons. First, that it would insure uniformity of design in the wood furniture to be used throughout the building; and, second, that you would secure the necessary furniture to complete the installation at an earlier date. With respect to this last mentioned point, we have examined the proposal of Marshall Field & Company submitted to us and are unable to find therein any reference to the time of delivery, but presume such time

of delivery is mentioned in other bids or documents which you have in your possession.

Under the law a contract should be awarded to the "lowest responsible bidder." In case the statute and the ordinances required an award to "the lowest bidder" no discretion whatever would be lodged in the official who awards the contract, but it is now universally recognized that there is a distinction between the two expressions and that a certain measure of discretion is vested in the officer who makes the award when he is directed to let same to the "lowest responsible bidder." The statutory requirement that public contracts shall be let to the lowest responsible bidder does not require the letting of a contract to the lowest bidder upon the ascertainment of his financial responsibility only, but the term "responsible" includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the terms of the contract. In other words, it requires the ascertainment of the ability of bidders to respond in the discharge of all the obligations assumed as to time, quality of goods or anything else that may be demanded under the terms of the contract. We have expressed this view in the precise language of a number of the courts of last resort, and the same is borne out by the following authorities:

Hallett v. City of Elgin, 254 Ill. 343; (Citing *People v. Kent*, 160 Ill. 655.)

Hannan v. Board of Education, 30 L. R. A. (n. s.) 214; (Okla.)

Butler v. Darst, 38 L. R. A. (n. s.) 653; (W. Va.) (With note on same.)

Williams v. Topeka, 38 L. R. A. (n. s.) 672; (Kan.) (With note on same.)

5 Words & Phrases, 4254.

3 Words & Phrases, 2nd series, 196.

From the above authorities we gather that it would be entirely proper for you to make the award to the lowest bidder in the aggregate if you can show that some material advantage will accrue to the city thereby in the way of greater efficiency or saving of time, so that the lowest aggregate bid-

der might in fact be regarded as the one who has made the lowest bid, taking into consideration the saving or the greater efficiency that results.

Under the circumstances presented, you cannot arbitrarily award the contract this way, but must be convinced and able to state that a real saving or greater efficiency will result in placing the order this way. Further, there is some doubt in our minds whether you are justified at this time in saying that it would be of advantage to have all the wood furniture from one concern on account of uniformity of design. That should have been taken into consideration when you asked for bids in groups, and the only justification there would be at the present time for this change of attitude lies in the fact that the bids are so near together that no great additional expense would be incurred by the city. Whether or not the saving in time would be a real advantage to the city is a matter entirely within your discretion.

In case you determine ultimately that you will award the contract to the lowest aggregate bidder instead of to the two lowest bidders for the respective groups, we recommend that you send notice by letter to each of the bidders stating your reason for coming to this determination before the contract is actually let.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Supervision of Unchartered Philanthropic Organizations.

November 23, 1916.

MRS. LOUISE OSBORNE ROWE, Commissioner of Public Welfare.
Dear Madam:

In reply to your letter of the 9th instant, relating to the supervision of unchartered philanthropic organizations and agencies, we beg to say:

We are of the opinion that your department has not, and that the City Council cannot clothe it with, authority at the present time to exercise compulsory supervision over these organizations and agencies; and there is considerable doubt as to how far, if at all, the Legislature, if it were disposed so to do, could, under the constitution, authorize the City Council to clothe your department with such authority.

It is possible, however, that the City Council might authorize your department to investigate and issue certificates of good standing to such unchartered philanthropic organizations and agencies as would voluntarily apply therefor, and if that were done the people could protect themselves by making contributions only to such organizations and agencies which had procured such certificates.

Practically, as we understand, the Association of Commerce does not pretend to exercise any compulsory control over chartered philanthropic organizations and agencies but issues certificates or cards to such as are worthy, and the public, being aware of this, recognizes and makes contribution only to those that have such certificates or cards.

Therefore it has occurred to us that you might accomplish much that you desire to accomplish if you were authorized by the Council to do what we have above suggested the Council might authorize your organization to do. But you know better than we do whether such suggestion is of any practical value. If you think it is we will see what we can work out along that line.

Referring to your other inquiry,—in our opinion it is the duty of the police, rather than of your organization, to prevent the improper sale, if any, of charities magazines on the streets.

We return herewith the folder from the Legislative Reference Bureau that you submitted to us.

Very truly yours,

DAVID T. ALEXANDER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Easement for Sewer.

November 27, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Under date of September 25, 1916, you transmitted to this department a form for an easement from John E. Van Natta to the City of Chicago to construct a sewer, and asked us to approve the same as to form.

Mr. Peacock orally called our attention to the fact that Mrs. Van Natta did not join her husband in the grant, and asked the question as to whether it was necessary for a wife to join in the execution of easements of this character. The authorities are not harmonious on this question and, after diligent search, we are unable to find a decision in point covering this particular kind of an easement.

It has been held that the husband can convey a right of way over the homestead without the concurrence and signature of his wife to the deed when such conveyance will not defeat the substantial enjoyment of the homestead as such.

Chicago & Southwestern Railway Co. v. Swinney, 38 Ia. 182.

Ottumwa, Cedar Falls & St. Paul Ry. Co. v. McWilliams, 71 Ia. 168.

C. T. & M. C. Ry. Co. v. Tillerington, 84 Tex. 225.

Randall v. Railway, 63 Tex. 586.

Am. & Eng. Ency. of Law, Vol. 10, 411.

A line of authorities contrary to the above is the case of *Pilcher v. Atchison, etc. R. R. Co.*, 38 Kas. 516. This involved a railroad right of way over homestead occupied as such by the family, and the case holds that no interest, encumbrance or lien can attach to or affect the homestead unless given by the joint consent of husband and wife. The decision also cites *Beach v. Miller*, 51 Ill. 206. In this case an action of covenant was brought to recover damages claimed to have been sustained by reason of an alleged breach of covenants contained in the warranty deed. In the decision of the case it was said, page 209:

“Was this right of way, then, an encumbrance upon the land? We think it was. It is true, the authorities on this question are not harmonious; but we think the current holds such an easement to be an encumbrance, and that they are supported by the better reason. In the case of *Prescott v. Trueman*, 4 Mass. 627, Chief Justice Parsons, in delivering the opinion of the court, says: ‘Thus the right to an easement of any kind in the land is an encumbrance. So is a mortgage. So, also, is a claim of dower, which may partly defeat the plaintiff’s title by taking a freehold in one-third of it.’ And to the same effect are the cases of *Mitchell v. Warner*, 5 Conn. 497, and *Harlow v. Thomas*, 15 Pic. 68, where it is held that a private way over the land is an encumbrance.”

In harmony with the foregoing case is that of *Weiss v. Binnian*, 178 Ill. 241.

In the case of *McGhee v. Wilson*, 111 Ala. 615, the court, in its able opinion on the question of a railroad right of way across the homestead and the necessity of the joint consent of the wife to the instrument granting such an easement, says:

“Conceding then that the instrument conveyed only a right of way, our conclusion is that it conveyed a right of way over the homestead. Not having been legally executed by the wife, the conveyance is null and void.”

Under our statutes neither spouse can legally convey or encumber the homestead without the free and voluntary consent of both. This applies as well to the wife’s right of dower in the property owned by the husband and the husband’s right of dower in that owned by the wife.

The question may be asked whether this character of an assessment of the right of way to lay a sewer across this lot with right of access thereto to repair, alter and operate the same in perpetuity is an encumbrance on the fee, to bring it within the operation of the statutes above mentioned.

We believe it is such an encumbrance; it prevents the owners from the exercise of complete dominion over the property and might in various ways molest the full enjoyment of their rights of ownership. Any other view appears to us to be antagonistic to the general intention of our Legislature in framing our statutes as to these rights.

In view of the foregoing we are, therefore, of the opinion that to properly protect the city's interests against any future claim by the wife that the grant was an infringement upon her dower and homestead rights, the wife should be required to join in the conveyance; and the conveyance should contain a clause releasing and waiving the right of dower and homestead. Such a clause should also be contained in the certificate of acknowledgment.

Very truly yours,

H. V. SHEPARD,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Payment of Increased Compensation to Judges and Clerks of Election.

December 1, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Under date of November 10, 1916, you addressed a letter to the corporation counsel asking for an opinion as to the right of the city to pay the difference between \$5 and \$7 to the judges and clerks of election, and secondly as to whether this additional compensation applies to every day of service or to election days only.

The Act changing the pay from \$5 to \$7 per day was enacted by the Legislature of Illinois in a bill approved June 29, 1915, which provided that "all judges and clerks of election in cities having a population of 500,000 inhabitants or over shall be allowed the sum of \$7 per day for their services, for each regular election and for each primary and \$5 for each registration and revision." Hurd's Illinois Revised Statutes, 1915-16, Chap. 45, Sec. 63, p. 1116.

Last spring a taxpayer instituted a suit against the election commissioners, the city comptroller and the city treasurer asking the court to enjoin the payment of any amount over \$5 per day on the ground that the Act in question failed to amend the proper law and that the amendment was therefore unconstitutional and void. The matter was heard by Judge Windes in the Circuit Court, who dismissed the bill for want of equity. Subsequently, an appeal was taken to the Supreme Court and that court on October 26th rendered an opinion sustaining Judge Windes and holding that the Act of June 29, 1915, was a valid enactment. *Fields v. Lueder*, 274 Ill. 562.

Pending the appeal of this case to the Supreme Court, I understand that the judges and clerks of election were paid at the old rates, to-wit: \$5 per day, the difference being held up by yourself pending the outcome of this decision.

In view of the fact that the Supreme Court has passed upon and determined that the law is valid and does increase the pay of the judges and clerks of election, I am of the opinion that the city has the right to pay the difference between \$5 and \$7 for the judges and clerks of election for each regular election and for each primary election that those judges and clerks have served since the law became operative.

Your second question is partly answered by the above statement, namely, that this applies not only to the days of election, but it applies to primary elections as well, even though it does not apply to the days of registration and revision. On those days, as provided in the Act, they receive but \$5 per day.

Yours very truly,

MORTON S. CRESSY,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Right of the City to Confiscate Fire-Arms and Ammunition
Seized on the Premises of George W. Streeter.**

December 2, 1916.

HON. H. F. SCHUETTLER, Acting General Superintendent of
Police.

Dear Sir:

We have your letter of November 27, 1916, asking for an opinion as to whether or not the police department should turn over, on George W. Streeter's demand, certain fire-arms and cartridges which were seized on his premises and which were not submitted in evidence and not confiscated by order of the court.

In the case of *McGregor v. Village of Lovington*, 48 App. 212, the board of village trustees passed an ordinance prohibiting the carrying of concealed weapons without the written permission of the president of the board of trustees of the village. In passing on the legality of the ordinance the court says:

"It is only by virtue of the police power of the state, based upon considerations of public necessity in respect to the peace and good order of society, that the *natural* right to carry a weapon can be denied, and it is essential that such power be exercised strictly in pursuance of law and in accordance with sound legal principles."

The statutes of the state have prohibited the carrying of concealed weapons, except by sheriffs, coroners, constables, policemen, and other peace officers, but the confiscation of such weapons is authorized by ordinance passed by the City Council in the exercise of the police power granted in the Cities and Villages Act.

Sections 2809 and 2810 of the Chicago Code of 1911 prescribe the method and procedure by which such confiscation shall be brought about, as follows:

"ARREST AND DETENTION.) Any policeman of the city may, within the limits of said city, without a warrant, arrest any person whom such policeman may find in the act of carrying or wearing under his clothes or concealed about his person, any deadly weapon of the

character in this article specified, or any other dangerous or deadly weapon, and detain him in custody until a summons or warrant can be procured on complaint made (under oath or affirmation) for the trial of such person, and for the seizure and confiscation of such of the weapons as such person may be found in the act of carrying or wearing under his clothes or concealed about his person.

WARRANT—ARREST—HEARING.) Upon the complaint made, under oath or affirmation, to any judge of the municipal court, in said city, that any person has been guilty of violating any of the provisions of the first section of this article, a summons or warrant shall issue for the summoning or arrest of the offender, returnable forthwith. Upon the return of such summons or warrant, such judge shall proceed to the hearing and determination of the matter, and if it shall be adjudged that such person has violated any of the provisions of this article, such judge shall so adjudge, and order that the weapon or weapons shall be forfeited to, and confiscated by, the city."

It is plainly evident that as a condition precedent to confiscation of a weapon a complaint shall have been filed under oath or affirmation for the trial of the person charged with the violation of the ordinance and for the seizure and confiscation of such of the weapons as such person may be found in the act of carrying or wearing under his clothes or concealed about his person; and a judgment by the court that the weapon or weapons shall be forfeited to, and confiscated by the city.

It is stated in the letter of Capt. W. F. Russell of the 23rd District, that the weapons and cartridges in question were not submitted to any court in evidence and it does not appear that they were the subject of any sworn complaint of the judgment of any court.

We are therefore of the opinion that the city cannot legally hold the property in question and it should be returned to the owner.

Very truly yours,

EDWARD H. WRIGHT,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Resignation of Commissioner of Public Works.

December 4, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We have been asked to advise you as to what disposition can be made of the office of commissioner of public works in case the resignation of the present commissioner is accepted to take effect before a meeting of the City Council which will act on the nomination of a successor.

The rule in all such cases is that in order to avoid an interregnum the appointing power may designate some person as the *de facto* officer temporarily who at least has the power to act until the body which is to approve such appointment meets and whose power will continue in case there is submitted to such body for approval a nomination which is not concurred in or as to which the concurrence is deferred.

In some instances the resignation of an officer cannot take effect until his successor is appointed and qualified. This is, of course, always the case where the statute or ordinance governing the election or appointment of such an officer distinctly says so.

In the case of the commissioner of public works, however, there is no provision of either statute or ordinance which requires an officer to continue to act until his successor qualifies, and the right to resign at any time is recognized in the absence of any law to the contrary in all cases where such a resignation will not produce an interregnum that will result in injury to private rights. (29 Cyc. 1403.)

The status of the deputy commissioner of public works is not such that he, by operation of law, would step into the shoes of a commissioner of public works who resigns. Nor is he authorized under the ordinances to act as commissioner of public works. The provisions of the Code under which he is appointed reads as follows:

“2081. OFFICE CREATED — APPOINTMENT — DUTY.)
There is hereby created the office of deputy commissioner of public works. He shall be appointed by the mayor,

with the approval of the City Council, and shall have authority, under and subject to the order, direction and control of the commissioner of public works, to sign or act for the commissioner of public works, and shall perform such duties as may be required of him by said commissioner."

It will be observed that the deputy commissioner of public works in handling the work of the office can sign or act for the commissioner of public works and his power is complete as long as the commissioner of public works holds office. But there is no independent authority given him which he can exercise in such a way as to bind the city in his own name. In order to give him this power it will be necessary for the mayor to designate him temporarily as acting commissioner of public works until such time as an appointment can be legally made. The power of the mayor to designate a person as acting commissioner of public works is not limited to the deputy commissioner, but he can name any person that he sees fit for this position temporarily. This right to appoint does not rest on any precise language to that effect in either the statutes or the ordinances. It is a right recognized by the common law designed to meet such an emergency as would arise in case of the death, or the suspension, removal or resignation of an officer who is not bound under the law to await the qualification of his successor. Consequently, if you deem it advisable to accept the resignation of the commissioner of public works in such a way that it shall take effect before the next meeting of the City Council it will be incumbent on you, in order to avoid an interregnum that will result in the stoppage of business so far as signing documents is concerned, to designate some one as acting commissioner of public works.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Extension of Coal Contracts.

December 6, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

We have your letters of November 22, 1916, and December 3, 1916, in and by which you inform us that in the contracts which the city has with various contractors for supplying coal there are contained provisions which read as follows:

“EXTENSION OF CONTRACT:

“That: The city may by authority of the City Council extend the Duration of Contract and Agreement from December 31st of this calendar year up to and including March 31st of the following calendar year.

“That: If the city elects to extend this contract, it shall send a notice, in writing, of its intention so to do to the contractor, at his address herein stated, not later than December 15th of this calendar year.

“That: Upon notification by the city to the contractor of its intention to extend the contract, as above stipulated, all the terms and conditions herein stated shall continue and be binding upon the city and the contractor to the end of Extension of Contract.

“That: If the time of performance of the Contract be for any reason, either expressly or by implication, extended, such extension shall not affect the validity of this Contract or the liability of the sureties upon the bond given for the faithful performance of the same.”

On November 23 we drafted and sent you a form of order to be adopted by the City Council in case the Council deemed it advisable to extend these contracts, but we expressed no opinion upon the validity of extensions under the provisions above quoted. You now desire our opinion as to such validity.

We entertain no doubt that these provisions would be valid and binding between private persons or corporations; but the question still remains whether they are valid and binding in a contract with a municipal corporation like the City of Chicago under the circumstances with which we are now confronted.

Our opinion will be based on the assumption that the facts are as hereinafter stated, and you must take the responsibility of correcting any misapprehension we may be under in regard to such facts.

We assume that all these contracts were made and entered into during the year 1916; that the individual contracts were not specifically authorized by the City Council, and that they are based upon appropriations made by the City Council in the annual appropriation bill or additional appropriations made prior to July 1, 1916.

These contracts were made and entered into on behalf of the city by certain of its executive officers, and by their terms they expire December 31, 1916, which is the end of the fiscal year. But the contracts contain a provision that they may be extended by authority of the City Council up to and including March 31, 1917.

Thus you will see that the ultimate question of law involved is, in substance, whether the City Council can, during one fiscal year, contract for its supply of coal during the whole or a part of the succeeding fiscal year.

If the city officials can make a contract for supplies up to December 31, 1916, with the privilege of extending the contract to March 31, 1917, we perceive no reason why they could not provide for an extension up to December 31, 1917, and even for a longer time.

Thus, if provisions of this kind are valid the city officials may make provision by which they may bind the city by contracts for the purchase of supplies covering long periods of time and without advertising for bids. We are not suggesting whether or not such contracts would be wise or unwise; we are merely analyzing the situation.

Referring to Section 4 of Article VII of the Cities and Villages Act, we find the following:

(Hurd's Revised Statutes 1915-1916, p. 315):

"No contract shall be hereafter made by the City Council or Board of Trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the objects of the expenditure shall have been ordered by

the City Council or Board of Trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

Section 208 of the Criminal Code, so far as material, reads as follows:

(Hurd's Revised Statutes 1915-1916, p. 915):

"Every person holding any public office (whether state, county or municipal) trust or employment, * * * who shall be guilty of contracting directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law or authorized by law to be contracted for or expended upon the subject matter of the contracts, * * * shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment."

You will note from the provisions above quoted that the city's election to extend these contracts must be exercised not later than December 15, 1916, so that the question of what the City Council could authorize during the first part of the year 1917, before, but in anticipation of, the adoption of the annual appropriation bill for 1917 does not arise.

In these circumstances with which we are confronted it seems to us that the sections of the statute which we have above quoted answer your inquiry and indicate quite plainly that it would be contrary to these statutes to undertake to extend these contracts by virtue of the provisions to which you have called our attention.

A provision in the contracts authorizing them to be extended on or after January 1, 1917, and before the adoption of the Annual Appropriation Bill for 1917 might, possibly, stand upon a different basis from the provisions which we are now considering.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Certain Coal Contracts.

December 6, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

You have called attention to certain clauses in the contracts for furnishing coal to various pumping stations and other municipal plants, which clauses read as follows:

“MINERS’ WAGE SCALE:

“That: Should the miners’ wage scale during the duration of contract or extension of contract be increased or decreased above or below the scale in force on date of opening of bids, there will be added to or deducted from the price bid one and one-half ($1\frac{1}{2}$) times the number of cents increase or decrease per ton corresponding to change in miners’ wage scale.

“That: Such correction due to change in the miners’ wage scale will be applied only to such coal shipped from the mines after the change in the scale has been made.

“That: The contractor will furnish such information as will positively prove any change in miners’ wage scale after the day of opening bids.”

So far as we know, the foregoing provisions are repugnant to no law, and hence are valid and enforceable. The substance of them is, that if the cost of producing coal increases or decreases during the duration of the contract, in consequence of an increase or decrease in the miners’ wage scale above or below the scale in force on date of opening bids, the price to be paid by the city will be proportionately increased or decreased. Thus the provisions are mutual as between the parties.

Whether or not there has at any time been such an increase or decrease in the miners’ wage scale is a question of fact which we think should be decided by you rather than by us. It appears from your letter that in the situation now presented there has been such an increase in the miners’ wage scale, but that, in view of all the elements which must be taken into consideration, it is somewhat difficult to determine exactly how much such increase has been. This situa-

tion furnishes an additional reason why you should investigate and determine this question of fact rather than for us to attempt to do so.

We perceive no objection to the form of the affidavits submitted. However, you are not bound to accept them as conclusive, but are at liberty to make such additional investigation as you deem necessary to ascertain what the exact truth is.

These affidavits show that since the bids were opened (which we assume also means during the duration of the contracts) the miners' scale (which we assume to be used as the equivalent of miners' wage *scale*) has increased not less than 10c. If you are satisfied that such is the case, then, under the terms of the contracts above referred to, the contractors would be entitled to an increase of 15c per ton, that is to say, an increase of one and one-half times the number of cents increase per ton corresponding to the change in miners' wage scale.

To illustrate a little more in detail, we submit the following tabulation:

If you find the increase in the wage scale to be 10c,	
then the increase per ton would be.....	15c
If you find the increase in the wage scale to be 9c,	
then the increase per ton would be.....	13½c
If you find the increase in the wage scale to be 8c,	
then the increase per ton would be.....	12c
If you find the increase in the wage scale to be 7c,	
then the increase per ton would be.....	10½c
If you find the increase in the wage scale to be 6c,	
then the increase per ton would be.....	9c

Obviously, if you are satisfied that the increase is *not less* than a certain amount, you would be warranted, so far as the city is concerned, in treating that as the basis upon which to compute the increase in the price of coal. For illustration, if you were satisfied that the increase in the miners' wage scale *was not less* than 6c, you would be justified in increasing the price of coal 9c; if you were satisfied that the increase in the wage scale *was not less* than 7c, you would

be justified in increasing the price of coal 10c; or, if you were satisfied that the increase in the wage scale was not less than 8c, you would be justified in increasing the price of coal 12c. And so on.

It seems to us that the provisions of the contracts above quoted are plain; but that the difficulty, if any, consists in ascertaining whether or not there has been an increase, as claimed, in the miners' wage scale, and if so, how much. This, as we have before stated, presents a question of fact for your department rather than ours to solve.

Of course, you will understand that the increase, if any, in the miners' wage scale to which we refer must have taken place "during the duration of contracts or the extension of contracts."

If you are satisfied that the increase in the miners' wage scale *exceeds* a certain amount, although you may not be able to determine the exact amount, obviously you would have the right to adjust the price on the basis of the increase in the wage scale being that amount or less than that amount, if you can procure the consent of the contractors to your doing so. Your duty is to see to it that they get no more than they are entitled to. This, of course, should not stand in the way of your consenting to their taking less than they may be entitled to if they are willing to do so.

Please bear in mind that we have not these contracts before us but only the quotation in your letter of the provisions now under consideration. Hence, we are only passing on these provisions and doing that on the assumption that your quotation is accurate and that the provisions quoted are not affected by other provisions in the contract.

Yours very truly,

H. V. SHEPARD,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Bids for Envelopes for the Municipal Court.

December 9, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You submitted to us a number of samples and bids relating to the proposed contract about to be let for furnishing one hundred thousand Municipal Court docket envelopes.

It appears from these documents and samples that the specifications require that the envelopes should be manufactured out of 125 lb. No. 1 jute manila and that a sample of same was exhibited to each bidder by the Municipal Court officials.

In response to the advertisement for bids, one of the bidders (Hedstrom-Barry Co.) submitted a bid and furnished two samples, but placed his bid so high that it cannot be considered. The next bidder (J. L. Thompson) submitted four samples, one of which was 125 lb. No. 1 jute manila and the same was in accordance with the specifications and came up to the requirements. His price for same was \$1,595. The third bidder (Cameron, Amberg & Co.) offered to make the envelopes on 125 lb. No. 1 jute manila "as per sample enclosed" for \$1,550. The third bidder being apparently a responsible party and being the lowest bidder would be entitled to the work provided there was no difference in the materials to be furnished by the different parties, but the sample submitted by this bidder seems to be of lighter weight, although the quality is apparently the same as the samples that are satisfactory.

From tests made by the writer and from his own knowledge of paper, it would seem as though this sample was 100 lb. paper instead of 125 lb. This view is strengthened by the fact that since the matter was turned over to the Law Department the bidder has sent in a new sample purporting to be 125 lb. No. 1 jute manila, which is heavier than the sample originally submitted and which seems to be more nearly in conformity with what is required.

In order that no injustice might be done to the low bidders, we made additional tests of the samples submitted and their sample seems to us to be lighter in weight than the others.

We must not be understood as deciding the question of the quality of these samples. We are merely indicating the appearance to us for the purpose of elucidating one view of the law. The question of quality is one of fact which you must decide. Assuming that you find that the sample submitted by Cameron, Amberg & Co. was light in weight the question presents itself then as to whether they are entitled to the work in view of the fact that they actually offered to furnish the 125 lb. stock; or, to put it otherwise, whether the city can take advantage of their lower bid, if it appears that through an honest mistake they submitted a lighter sample than they intended and they are now willing to furnish as good stock as the others at a lower price.

This question hinges on whether they were required to submit samples. If under the specifications bids were permissible without samples, it might be argued that the statement to the effect that the 125 lb. stock would be furnished is what controls. The fact that all submitted samples, however, and the further fact that this concern's bid stated that the work was to be done "as per sample enclosed" seems to indicate that the matter is in the discretion of the head of the department who is to award the contract, and he may, if he sees fit to do so, take into account the difference in the samples and award the bid to the next lowest bidder on the theory that the samples submitted warrant the paying of the additional price.

Whatever determination the head of the department comes to in regard to this matter cannot be disturbed by court action for the reason that it is a clear case of having the right to exercise this discretion.

We suggest in this connection that if the contract is awarded to Cameron, Amberg & Co. you should satisfy yourself that the 125 lb. material is being supplied, because these parties insist that was what was contemplated in their bid

and that if a sheet which did not come up to this standard was submitted by them as a sample it was accidental.

You have also asked us the question as to whether you can properly let a contract for two sets of public record indexes to Wilson-Jones Loose Leaf Co. You state that proper advertisement was made for same but that only one bid was received, and that you understand this concern is the only one in Chicago that does this sort of work.

The law prohibits drafting specifications or advertisements for competitive bidding in such a way as to exclude all but one concern. It does not permit the handling of the work in such a way that it necessarily goes to parties who have a monopoly. Aside from that, however, the law is complied with if there is only one bidder in response to an advertisement.

We assume from what you say that the parties that have made the bid do not have a monopoly in this line although they may be the only ones in the city who make a business of this kind of work. In other words, if other parties desire to do the work there is nothing to prevent their doing it in the way of patent rights or other obstacles which would hinder them from competing, and there is no reason why parties from other cities could not compete.

Such being the case it is proper for you to award the contract to the sole bidder.

We return herewith bids, samples and advertisements referred to above.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Suit for Wages Under Invalid Appropriations.

December 11, 1916.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

Dennis A. Manning has brought a suit in the Circuit Court to recover wages he claims to be due him for services rendered in the Department of Gas and Electricity. We understand that other persons similarly situated, but whose names we do not know, intend soon to bring like suits either in the Circuit or the Superior Court. These plaintiffs claim that they are entitled to the wages they have earned, regardless of whether or not the Department of Gas and Electricity has made deductions to the aggregate amount of \$140,000 from the total of the items appropriated for it in the Annual Appropriation Bill.

These plaintiffs intend their cases to be test cases in the interest of approximately 525 other employees who are similarly situated.

It seems to us that it is important to the public, as well as just to these wage earners, that the question presented should be speedily determined by the courts.

Therefore, we have agreed with counsel for the plaintiffs that the city would interpose no dilatory defenses but would co-operate to bring about hearings upon the merits at the earliest possible time.

Our understanding is that there is no question of fact involved, but only the question of law as to the validity of the provisions in the Annual Appropriation Bill requiring the heads of departments to make certain deductions at their discretion from the aggregate of the amount of the items appropriated for them. Accordingly, we have prepared a plea, of which a copy is handed you herewith, in which we have set up all the pertinent facts as we understand them, so that the plaintiff may, by demurring to such plea, raise the question of law which is involved.

In view of our opinion that the provisions for deduc-

tions in the Annual Appropriation Bill are invalid, we deem it proper to call to the attention of yourself and the Finance Committee what is being done in the cases above referred to so that you will have an opportunity to make such suggestions or objections, if any, as you deem proper with respect to the procedure we have above outlined.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Meters to Be Installed by Chicago Telephone Company.

December 12, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your questions concerning the contract ordinance of the Chicago Telephone Company, we submit the following:

The first question you ask is as follows:

“Does contract give right to the city to force the installation by the telephone company of a metering device at the consumer’s end, in the event that one should be perfected?”

The answer to this question appears in the excerpt from Section 6 of the ordinance granting the rights to the Chicago Telephone Company under which it is now operating, passed November 6, 1907. (Council Journal, pages 3109-3133, excerpt being taken from pages 3118-19.) Said provision is as follows:

“(g) Meters on Measured Service Lines.

“The Chicago Telephone Company shall install in connection with each measured service line of its lessees and subscribers a meter which shall prove effective in actual use for accurately and correctly recording the number of outgoing messages or conversations over said line, and at any time that a practicable meter for use upon

the premises of the lessee or subscriber in connection with such line shall be devised and prove effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, the company shall install the same in connection with each line of its lessees of and subscribers to measured service upon their premises.

“If any question shall arise as to whether any meter or meters hereinabove provided for shall reasonably protect the lessee or subscriber in the counting of outgoing messages, or as to whether or not a practicable meter for use upon the premises of the lessee or subscriber to a measured service line has been devised and proved effective in actual use for accurately and correctly recording outgoing messages or conversations, as aforesaid, such question or questions shall be submitted to the chairman of the Finance Committee of the City Council, the commissioner of public works, and the corporation counsel, who shall together hear such facts as may be presented by the parties to the controversy, and they, or a majority of them, are hereby given the power to decide such question or questions, and to require said Chicago Telephone Company to make such changes in any meter or meters, or the method of operating the same, as they shall deem reasonably necessary to protect the lessees and subscribers of said Chicago Telephone Company to measured service, and to require the installation by said company of a new meter or meters for use upon the premises of the lessees and subscribers, and to take any other action in the premises which they shall deem reasonably necessary to protect the lessees and subscribers of said company.”

It will be seen from the above that the Chicago Telephone Company was required under this ordinance to install a meter on its own premises for the purpose of recording the number of outgoing messages when the ordinance went into effect. It will further be seen that the ordinance provides that whenever a practicable meter shall be devised and prove effective the company can be required to install same in the premises of the subscribers to measured service.

Both of these provisions are mandatory and the only question to be determined is whether a practicable meter has been devised. This question, like the question as to whether

the meter now on the premises of the company is such as to protect the lessee or subscriber, is one that can at any time be submitted for decision to the chairman of the Finance Committee, the commissioner of public works and the corporation counsel, a majority of whom have the power to decide such question. In case the question is so submitted and it is decided that a practicable meter has been devised which will prove effective, these officials have the power under the ordinance to require the Chicago Telephone Company to make the changes that they deem reasonably necessary in order to carry into effect these provisions of the ordinance.

The second question asked is as follows:

“In whom is the authority vested to enforce this feature of the contract, namely, installation of metering device that will do the work—the City Council, the mayor, commissioner of public service, or city electrician?”

In order to properly answer this question it is necessary to refer to the duties which devolve upon the commissioner of public service, which by the ordinance creating the department, as amended on July 15, 1915, (Council Journal, p. 1384) are as follows:

“Section 6. DUTIES.) The department shall require all public utilities, under its jurisdiction, supervision or control, which supply or furnish any service, product or commodity to the city or to the inhabitants thereof, to comply with the terms and provisions of their grants. The department shall make investigation of said public utilities and shall collect and preserve, under convenient form and index, necessary, useful and valuable information, reports, statistics and other data relating to the regulation of rates, the furnishing or supplying of any public service, product, or commodity to the public, or relating to the safety, health, comfort or convenience of the public and the patrons and employes of such public utilities. *Provided, however, that the sanitation of street cars and other public conveyances, including cleanliness, ventilation and heating, be under the jurisdiction of the commissioner of health.* The department may collect and preserve under convenient form and index, such other information, reports, statistics and data pertaining to public utilities in other cities, states and coun-

tries, as it shall deem useful. The department shall, whenever the City Council by its order so directs, formulate and set forth in writing any matter of complaint against any public utility which shall supply or furnish any service, product or commodity to the city or to the inhabitants thereof, and shall take such further action on said matter of complaint as the City Council may direct."

We are of the opinion that although the contract ordinance under which the telephone company operates gives the power to determine the question of installing meters into the hands of the officials named therein, that it does not contemplate that these officials should take the initiative. The ordinance is silent on this subject, and in the absence of any direction in that ordinance, the ordinance creating the Department of Public Service controls. We regard it as within the province of the commissioner of public service, if he is of the opinion that a practicable device has been perfected, to demand of the Chicago Telephone Company that such device be installed in accordance with the terms of the ordinance. The initiative may also be taken by the mayor through the medium of a communication or message to the City Council, if he sees fit to submit the matter to the City Council for action before proceeding to require such installation. It is our opinion, however, that the City Council will not have to act in the first instance, and that it will only be necessary to submit the matter to the officials named in the ordinance if some question arises as to the practicability or effectiveness of the meter which is to be installed. The duty of supervision and control lies with the commissioner of public service, upon whom devolves the authority to require the telephone company to meet the provisions of the contract ordinance.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Police Powers in Traffic Regulation.

December 12, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In reference to your inquiry as to the powers of police officers in the matter of prohibiting the obstruction of Michigan boulevard and Rush street during the congested periods of the day by wagons and trucks standing in those streets during the process of loading, we beg to say that Section 2439 of The Chicago Code of 1911 provides as follows:

“Whenever, from any cause, any street or alley in the city shall be obstructed, the mayor, or any alderman or police officer may give such directions in regard to the movement of pedestrians, vehicles and street cars as may be required by public convenience. Any person or persons, refusing or neglecting to obey such directions shall be fined not less than one dollar nor more than twenty-five dollars for each offense.”

The power of a municipality to require by ordinance that vehicles using the city's streets shall obey the directions of police officers or other designated officials is clear.

Dillon on Mun. Corporations, Vol. 3, p. 1854.

Veneman v. Jones, 118 Ind. p. 41.

St. Paul v. Smith, 27 Minn. 364.

Commonwealth v. Robertson, 5 Cush. (Mass.) 438.

Commonwealth v. Matthews, 122 Mass. 60.

We are of the opinion, therefore, that under the above provision of the code the police may prevent vehicles from unreasonably obstructing the streets above named, for the purpose of loading or otherwise, and whenever there is such congestion that traffic is seriously interrupted by their presence, cause such vehicles to move on.

The powers of police officers in this respect, however, are clearly intended to be exercised when particular situations require such action, rather than by the establishment of general rules of conduct to be followed from day to day. The direc-

tions given should be such as may be warranted by the existing conditions at the time they are issued.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Jurisdiction Over Steam Boilers in Harbor.

December 13, 1916.

HON. EDWARD L. MILLER, President, Board of Examining Engineers.

Dear Sir:

We are in receipt of your letter asking whether your department has jurisdiction over steam boilers and engines being operated on the river and harbor of Chicago.

The river and harbor of Chicago is navigable water and is subject to government supervision. This supervision includes the inspection of all steam boilers and steam engines in self-propelled boats, engaged in navigating the waters of the river and harbor of Chicago.

All engineers in charge of steam engines and boilers in self-propelled tugs and other vessels used in the navigation of said tugs or vessels on the Chicago river, are subject to government supervision and cannot be controlled by your board. The engineers engaged in operating steam engines and boilers on steam dredges and pile drivers are not subject to government supervision because they are not engaged in navigating the dredges and pile drivers.

On the question of whether your board has jurisdiction over steam boilers and engines used in pile driving, dredging and like work on the river and harbor of Chicago, but where the engines and boilers are not used for the propelling of said boat this department has heretofore, under date of November 3, 1897, rendered the following opinion:

"November 3, 1897.

"Mr. Wm. Hurin, Secretary,

"Board of Examining Engineers.

"Dear Sir:

"Replying to your letter of the 2d inst., asking whether the ordinance governing the licensing of engineers can be legally amended so as to include engineers operating steam dredges and pile drivers on the river:

"I call your attention to the 30th Sub. of Par. 63, Art. 5, Chap. 24, Starr & Curtis, Powers of City Council, as follows:

"'To deepen, widen, dock, cover, wall, alter or change channel of water courses.'

"I also call your attention to Par. 72 of Art. 5, of Chap. 24, Starr & Curtis, as follows:

"'Jurisdiction over Waters—Street Labor.

"'The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state. * * *'

"I am therefore of the opinion that all those engineers operating steam dredges and pile drivers on the Chicago river and its branches within the limits noted in said Par. 72 under the authority and direction of the City of Chicago can be required to obtain licenses therefrom from the city under the present ordinance.

"So that an amendment such as is suggested by you, would simply serve to make your authority as a licensing board more specific and more easily interpreted.

"Respectfully yours,

"(Sgd) J. R. CORRIGAN,

"*Assistant Corporation Counsel.*

"Approved:

"(Sgd) CHARLES S. THORNTON,

"*Corporation Counsel.*"

The statutory provisions shown in the foregoing communication are still in force and we concur in the foregoing opinion.

Yours very truly,

GEO. A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Construction of Bridges by the Sanitary District of Chicago.

December 14, 1916.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to a verbal request for information in regard to the way in which it came about that The Sanitary District of Chicago constructed bridges which were afterwards taken over by the city, we beg to submit the following:

The first official record of anything that transpired in connection with this matter that we have been able to discover was a communication addressed to the City Council under date of January 29, 1900, by the mayor. (Council Journal of January 29, 1900, pages 2291-3.) In his message to the Council the mayor called attention to the fact that the Drainage Canal was then open and that in his opinion the main channel as well as the south branch of the river should be regarded as part and parcel of that canal, that the law required a certain flow of water which was increased in a fixed ratio with the population of the city, and that it would be the duty of the Trustees of the Sanitary District to provide for such increased flow from time to time. He stated further that these trustees had already recognized their obligation by the removal of certain bridges where the river channel was too cramped to meet requirements and asked whether it was not a proper step for them to assume the work of removing the center piers of bridges then in existence in order to provide for an adequate flow of water through the canal. He recommended that the standing Committee on Harbors, Viaducts and Bridges, be instructed to request the trustees of the Sanitary District to take up immediately the question of removing, at the expense of the Sanitary District, all center pier bridges which constituted obstructions to the flow of water necessary to properly serve the drainage channel in that portion of the river which fed the canal, and substituting in their stead modern bridges of the bascule type.

As a result of negotiations following this communication, an understanding was reached with the trustees of the

Sanitary District whereby certain bridges which had center piers were to be replaced with bascule bridges.

But, inasmuch as the city required double track bridges instead of the single track bridges then existing, it was agreed that the city should pay the additional expense entailed by the enlargement of the bridges, the Sanitary District to pay for all that part of the work which was equivalent to the construction of bridges of the same size. Thereupon two ordinances were prepared and submitted to the City Council on July 16, 1900, with a communication from the mayor. (Council Journal of July 16, 1900, pages 919-923.) In this communication the mayor stated that he had caused to be prepared an ordinance authorizing the making of a contract between the city and The Sanitary District of Chicago for the payment to the Sanitary District of the additional cost of replacing the bridges over the Chicago river at State, Randolph, Harrison, Polk, Eighteenth and Main streets and Ashland avenue with double track bridges, over the cost of replacing these bridges with single track bascule bridges of the width of the structures then existing.

The communication further stated that the ordinance had been drawn after conference with representatives of the Sanitary District, that the sum required to do the work was \$586,000, and that to provide this sum another ordinance had been drawn authorizing the issuance of bonds for the purpose.

The two ordinances submitted by the mayor at that time were passed by the City Council immediately. (See reference as above.)

While we have not gone into the matter so as to ascertain what other negotiations were had concerning these bridges it would seem that there must have been some question about the power of the trustees of the Sanitary District in the premises, because the act extending their powers so as to definitely give them the right to build such bridges was passed and approved May 13, 1901. (Hurd's Rev. St. 1915-16, page 409.)

Under this new statute the trustees of the Sanitary District were given power to construct bridges to meet the altered or changed condition of the river. The act provided, among other things, that nothing contained in same should be con-

strued as depriving the city of any power it exercised in the operation of said bridges, and, further, that any bridges built under the provisions of that act to supply or replace an existing public street or highway bridge shall, after the construction of same, be operated and controlled for municipal purposes by the city.

Pursuant to arrangement made as above stated, and subsequent arrangements, the trustees of the Sanitary District constructed the following bridges in the years mentioned, viz.:

Bridge	When Built
Taylor street (basculer)	1901
Ashland avenue (West Fork) basculer.	1902
Throop street (basculer)	1903
Canal street "	1903
Randolph street "	1903
State street "	1903
Loomis street "	1904
18th street "	1905
Harrison street "	1905
22nd street "	1906
Dearborn street "	1906
Jackson boulevard "	1915
Argyle street (North channel) fixed..	
E. Foster avenue " " " ..	

In each case the bridge as soon as completed was turned over to the city which has maintained and operated it since it was built.

We gather, from what was stated to the writer, that you do not care for a review of the various ordinances and orders that were passed in relation to these bridges, but that you desire merely general information as to how it came about that the Sanitary District trustees had constructed bridges which were turned over to the city in order to enable you to pass on the contract relating to the construction of the bridge at South California avenue.

We return herewith the letter from the deputy commissioner of public works and contracts for this bridge.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Vacation of Alleys in Leather's and Silverman's.
Subdivisions.**

December 15, 1916.

HON. WM. R. MOORHOUSE, Commissioner of Public Works.
Dear Sir:

Replying to your communication of August 21st, in which you furnish additional information and ask the further opinion of this department, based upon such additional information, with reference to the validity of two purported vacation instruments, vacating certain alleys in Leather's Subdivision and Silverman's Subdivisions, we beg to state that upon investigation we find that our original information with reference to this property being built upon in its entirety was incorrect, and from a personal investigation of the premises by the writer, we are of the opinion, irrespective of the question of whether the dedications were statutory or common-law, that the city accepted these streets and alleys by reason of public improvements that were made prior to the alleged vacations, such as the laying of a 6" water pipe in November, 1885, in Fillmore street; a 6" water pipe in May, 1889, in S. Campbell avenue; an 8" water pipe in June, 1891, in Arthington street, and a 6" water pipe in October, 1888, and it acquired a vested interest in all of said alleys for the uses and benefit of the public.

"The fact that the alleys had never been improved and had been for some years within the enclosure of private persons has no potency to defeat the rights of the city. The mere adverse possession by the owner, in the construction of the alleged fence, however long continued, does not by virtue of the Statute of Limitations bar the right of the public to be restored to possession of the alley. Mere non-user of a street or alley, no matter how long continued, does not deprive the city, as the representative of the public, of the right to take possession thereof."

Consumers Company v. City of Chicago, 268 Ill. 113-133. (*Village of Lee v. Harris*, 206 Ill. 428.)

The doctrine of equitable estoppel, as set forth in our opinion of November 18, 1915, to Mr. John D. Riley, superintendent of maps, does not apply.

It is my opinion that the purported vacations, referred to as document No. 1,668,389, dated May 5, 1892, recorded May 19, 1892, and document No. 2,336,882, dated January 10, 1896, and recorded January 21, 1896, are of no force or effect.

Very truly yours,
ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Corporation Counsel.

December 18, 1916.

HON. M. A. MICHAELSON, Alderman, 33rd Ward.

Dear Sir:

We beg to acknowledge receipt of your request for an opinion as to the validity of a proposed ordinance amending Section 89 of The Chicago Code of 1911, published in Pamphlet 652, by adding the following to said Section 89:

“except where special counsel is provided by the City Council for its standing committees or special committees or commissions.”

The corporation counsel is, by statute, made the head of the Law Department of the city, and, with the aid of his assistants, is charged with the duty of conducting, and fully empowered to conduct, all the law business of the city and its departments.

Section 193a1 of Chapter 24 of the Cities and Villages Act, page 328, Hurd's Revised Statutes, 1916, provides as follows:

“§ 7. The head of the Law Department of the city shall be the corporation counsel, and the duties heretofore performed by the city attorney shall be performed

by the corporation counsel and his assistants. From and after the adoption of this act the office of city attorney shall be abolished."

By the adoption of this act by the people of the City of Chicago, the provisions of The Municipal Code of 1905 in reference to the appointment of his assistants by the corporation counsel, as well as other matters in this connection, became in legal effect a part of said act and were placed beyond the power of the City Council "to destroy by repeal." There is, therefore, vested in the corporation counsel a statutory right to appoint all assistants necessary to aid him in properly carrying on the law business of the city. So much of the Cities and Villages Act of 1872 as may be in conflict with such power of appointment is repealed by the Act of 1905 quoted above. Assistants appointed for special work, commonly denominated "special counsel," when necessary, must be members of the Law Department and appointed by the corporation counsel. Any other appointment of special counsel is void. When appointed, they are under the direct superintendence of the corporation counsel and must conform to the directions imposed by him. The corporation counsel is the attorney for the municipal corporation, its various officials, the City Council and its committees.

In this connection we desire to call your attention to the decision of the Supreme Court of Illinois in the recent case of *Fergus v. Russell et al.*, 270 Ill. 342, a case which presented questions similar to the one involved in this matter. In that case the insurance superintendent was authorized by an act passed by the General Assembly to employ special counsel, and a taxpayer brought an injunction to restrain the state from paying the special counsel's fee, through an appropriation made by the General Assembly. In that case the court held that the attorney general was the chief law officer of the State of Illinois and that he was the only officer empowered to represent the people in any suit or proceedings in which the state is the real party in interest; that he is the sole official adviser of the executive officers and of all boards, commissions and departments of the state government; that

all appropriations for the payment of legal services to be rendered in behalf of the State of Illinois must be made to the office of the attorney general.

We also desire to call your attention to the language used by Judge Dillon, one of the greatest authorities on law relating to municipal corporations, in discussing the question here under consideration :

“If the scheme of municipal government provides a corporation counsel or city attorney or other legal officer for the municipality whose duty it is to appear on behalf of the municipality in all suits by or against the corporation, and to conduct all the law business of the corporation, the municipality is deprived of its power to employ another attorney to take the place of and perform the duties which naturally belong to its law officer.” (Dillon on Mun. Corp., Sec. 824, p. 1224.)

The corporation counsel stands in exactly a similar position with reference to the City of Chicago as the attorney general does to the State of Illinois. The attorney general is the sole head of the Law Department of the State and the corporation counsel is the sole head of the Law Department of the City of Chicago; and any ordinance taking from the corporation counsel the power to superintend and conduct any of the law business of the City of Chicago is invalid and illegal and is beyond the power of the City Council to enact.

Very truly yours,
JAMES W. BREEN,
GOTTHARD A. DAHLBERG,
Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Court Orders Concerning Pay Rolls.

December 26, 1916.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

In response to your verbal request for a statement from us concerning the payments to be made to various city em-

ployes in pursuance of court orders, we beg leave to submit the following:

Judge J. J. Sullivan on December 23, 1916, entered an order for a writ of mandamus in the case of *People ex rel. Borling v. Pike et al.*, which provided for the payment of unpaid salaries of the officers and employes of the Civil Service Commission for the period ending December 8, 1916; also for the payment of such salaries in the Department of Gas & Electricity for the periods ending December 4 and December 19, 1916; also for the payment of such salaries in the Bureau of Statistics & Municipal Library for the period ending December 23, 1916; also for the payment of such salaries in the office of the city collector for the period ending December 5, 1916. The order likewise included the payment of balances of salaries for the semi-monthly period ending December 20, 1916, for the Bureau of Weights and Measures. This order was also intended to include the payment of such salaries in the Department of Buildings for the period ending December 20, 1916, but through some mistake a part of this payroll was not included in the petition, and necessarily is not now included in the order of the court. We understand that it is the intention of the parties representing the petitioners to appear before the court and either file a petition on behalf of those omitted or take some other action which will provide for the payment of their salaries. In case this is done the omitted parties will be again on the same footing as those of the department who were paid. If not, then these salaries will probably have to be included in a later petition.

It will not be proper to pay such salaries beyond the period for which such order is entered in each of the respective departments and bureaus unless the city treasurer signifies his intention to recognize the order as binding for the remainder of the year. It may be that the city treasurer would prefer to withhold payment if no further order of court is entered concerning the above salaries and stand on his rights to have the question as to each officer and employe adjudicated before payment is made.

With respect to the Municipal Court, there were two petitions for mandamus filed. One was filed on behalf of the

employees of the clerk of the court, the other on behalf of the employees of the bailiff of the court. The result is that there are some Municipal Court employees who are not included in either of the two petitions and their salaries will probably have to be withheld until further action is taken.

We stated in a recent letter to you that we did not believe it would be necessary to withhold salaries from the clerks and bailiffs of the Municipal Court for any part of the year 1916 because it would be compelling these parties to litigate again the same question which was brought before Judge David when the hearing came on concerning the employees of the Municipal Court clerk's and bailiff's offices. Our reason for so stating was that Judge David's order holds specifically that the deduction made in the appropriation bill concerning the Municipal Court did not affect the appropriations for salaries and wages in these offices. We recommend, however, that before you issue warrants for further payments, you ascertain the intention of the city treasurer concerning these two offices.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Pay Rolls of Employees Under Appropriations of Questionable Validity.

December 27, 1916.

HON. CHARLES H. SERGEL, City Treasurer.

Dear Sir:

In response to your verbal request concerning the orders entered in court in reference to payment of salaries and wages of officers and employees, we beg leave to submit the following:

Judge J. J. Sullivan on December 23, 1916, entered an order for a writ of mandamus in the case of *People ex rel. Borling v. Pike et al.*, which provided for the payment of

unpaid salaries of the officers and employes of the Civil Service Commission for the period ending December 8, 1916; also for the payment of such salaries in the Department of Gas & Electricity for the periods ending December 4 and December 19, 1916; also for the payment of such salaries in the Bureau of Statistics & Municipal Library for the period ending December 23, 1916; also for the payment of such salaries in the office of the city collector for the period ending December 5, 1916. The order likewise included the payment of the balance of the salaries for the semi-monthly period ending December 20, 1916, for the Bureau of Weights and Measures. This order was also intended to include the payment of such salaries in the Department of Buildings for the period ending December 20, 1916, but through some mistake a part of this payroll was not included in the petition and necessarily is not now included in the order of the court. We understand that it is the intention of the parties representing the petitioners to appear before the court and take some action which will either correct the matter so as to provide for the remaining employes in the Building Department or include the amounts so due in some later petition.

We understand from Mr. Thorne that he makes no special objection to these salaries which were omitted, and that he will only press the general objections which he raised to the payment of all the other employes who sued collectively in that case. In this way the matter may be simplified so that an order can be quickly entered if such a case is brought which will include the balance of the employes of the Building Department for the period ending December 20, 1916.

We assume that the full significance of the orders entered in the two cases involving the offices of the clerk and bailiff of the Municipal Court has been fully explained to you. These orders directed the payment of the employes of said offices for the period ending November 30, 1916.

We have advised the comptroller that so far as he was concerned there would be no object in requiring these clerks and bailiffs to again litigate the precise question on which an opinion was rendered by Judge David, who held specifi-

cally that the reduction clause following the appropriations for the Municipal Court did not apply to these salaries and wages, but we recommended in our letter to the comptroller that before he issues additional warrants he should ascertain what your attitude is in regard to these two payrolls.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Operation of Free Employment Bureau.

December 30, 1916.

MRS. LOUISE OSBORNE ROWE, Commissioner of Public Welfare.

Dear Madam:

We are in receipt of your communication asking for an opinion as to whether the operation of a free employment bureau by your department is within the purview of the ordinance of March 23, 1914, creating the Department of Public Welfare.

The ordinance creating the Department of Public Welfare was passed March 23, 1914, and appears on pages 4588 and 4589 of the Council Proceedings of that date. The section of said ordinance relating to employment is as follows:

“Section 3. There is hereby created a bureau of the Department of Public Welfare, which shall be known as the Bureau of Employment and which shall operate the Municipal Lodging House for Men and the Municipal Lodging House for Women, and which shall perform such duties in the collection of information relative to working conditions, wages, hours of labor and unemployment in the City of Chicago, and in the practical relief of unemployment, as may be required by the said commissioner of public welfare. The chief officer of said Bureau of Employment shall be known as the superintendent of the Bureau of Employment.”

There is no specific authorization for the creation of a public employment agency, and it is doubtful if such a con-

struction could properly be given to this section. But if this provision in the ordinance creating the Department of Public Welfare was more specific and authorized the carrying on of a public employment agency, such authorization would be of no legal effect, as the power purported to be invested is not within the powers granted to the city under the Cities and Villages Act.

The only reference to public employment agencies contained in the Statutes of Illinois is an act relating to employment offices and agencies creating the Illinois Free Employment offices, approved and in force May 11, 1903, being Sections 53, 53a, 53b, 53c and 54 to 64 inclusive of Chapter 48, (Hurd's Revised Statutes of 1916, pp. 1248 to 1251).

This act provides for the establishment of an office in Chicago and of offices throughout the state, and makes no provision for the establishment of such offices by municipalities.

It is our opinion, therefore, that the carrying on of a public employment agency by your department is not within the power vested in the City of Chicago, and is therefore illegal.

Very truly yours,

GEORGE A. CURRAN,

JOHN A. COOKE,

Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Duties of Business Agent as to Requisitions Other Than
for Materials, Supplies or Labor.**

January 2, 1917.

HON. VIRTUS C. ROHM, Business Agent.

Dear Sir:

We are in receipt of two letters from you, one under date of November 10, 1916, relating to certain paving repairs made by the South Park Commissioners, and the other under date of December 5, 1916, relating to a number of requisitions

of which we shall speak later. Inasmuch as the questions involved are the same, we will answer both letters at the same time.

The questions you have asked concerning the course to be pursued by you in honoring requisitions prompts us to make some general observations in regard to the duties of the business agent. The Chicago Code of 1911, as amended by the ordinance of March 9, 1914, (Council Journal, pages 4347-49) contemplates that the business agent shall be responsible for the purchase of supplies and materials and that he shall let contracts for labor in all cases where such purchases or contracts amount to less than the sum of \$500. These provisions of the code prescribe your duties exactly, in so far as such purchases and such contracts are concerned. We find, however, that your department, in addition to having in its charge the work thus required of it, has been and is now used as a sort of adjunct for the convenience of the Accounting Department. The only authority for this is contained in Section 2516 of the code, which requires the business agent in all things pertaining to his office and in the discharge of the duties thereof to conform to the rules and regulations of the city comptroller. The comptroller acting under the authority given him by that and other sections of the code has provided that requisitions involving expense to the departments of any kind or nature coming within the maximum of five hundred dollars shall be filled through the office of the business agent. This practice has grown up as a matter of convenience and as a result of experience which has demonstrated that the only way of avoiding duplication of payments is by means of such a system as has been in vogue in your department, by which the department or bureau head is required to make out a requisition for everything, whether it comes within the ordinance requirements as a part of the duties of the business agent or not.

We are, therefore, of the opinion that your duties are two-fold. Such of them as relate to the purchase of supplies and materials and the contracting for labor are very precisely defined, and you are supposed to follow out the directions of

the ordinance in purchasing supplies and materials and in making contracts for labor.

As to other matters, you are acting merely as the agent of the accounting department and your responsibility extends only so far as is necessary to keep a check on the incurring of expenses as may be directed by the comptroller. There are a great many different kinds of requisitions that pass through your hands that belong to this latter class, among them being some of the requisitions that you have asked us about. For instance, a requisition for the payment of demurrage, for paving which must be done by a certain party like the South Park Commissioners or Chicago Railways Company, etc. As to such matters as these, it must be plain that they are not within the scope of the department as outlined by the express duties defined by the code. You could not be required to secure bids for such work or such expenses, to say nothing of the fact that the same cannot be regarded as either supplies, materials or labor. Hence, as to all such matters your duties involve only the question of the proper accounting under the direction of the comptroller, and the parties who put through the requisitions are the ones who are responsible for the expense incurred.

If this distinction is borne in mind, much that you have made inquiry about is disposed of, but there still remains another class of requisitions which comes properly within the purview of your duties to which you cannot apply the ordinance with the strictness that the wording of same seems to require. We have reference to expenses incurred in emergencies. The law recognizes that the responsible head of a department, and sometimes even a subordinate, must, in the conduct of the business of the city, occasionally meet emergencies where he is called upon to act without delay and where he can justify the incurring of an expense without the formality of a requisition. Under such circumstances the city is bound to pay the contracting party, and the contracting officer (in this case the business agent) is relieved of responsibility for failing to secure bids and proceeding with the usual formalities. We recommend that in all cases where

such emergency exists and a requisition is presented to you after the purchase is made or the expense is incurred you should require of the head of the department or bureau a letter of explanation to be attached to such requisition, so that the responsibility may be placed where it belongs. However, upon the receipt of such a letter stating that there was an emergency, such a requisition really comes within the class mentioned above where you are not required to follow exactly the procedure set forth in the ordinance.

Taking up now the different items that you have inquired about, we find that in your letter of November 10, 1916, you call attention to four requisitions from the Water Pipe Extension Division of the Bureau of Engineering. These relate to restoring pavement in Drexel boulevard at two different places. In each case the work was done by the South Park Commissioners, and that municipality has the right to do that work and charge it to the city. The bills were made out in such a way that they covered different parts of the same work and it might be said that this was not proper, owing to the fact that where the two parts were combined the total amounted to more than five hundred dollars. But since there was no way in which competitive bids could be secured by the city, and the combination of the two items would make it appear that there had been a neglect of duty on the part of some one, we do not believe there was anything wrong about making the bills in two parts as was done. Under ordinary conditions the "splitting" of a job for the purpose of making the items come within the five hundred dollar limit is a practice that cannot be condoned. Nevertheless, under the peculiar circumstances in this case we see no reason whatever for holding up the requisition which has been properly audited and vouchered.

With your letter under date of December 5, 1916, you submitted three requisitions covering bills for demurrage from the Bureau of Waste Disposal. These come distinctly within the class of expenses for which you are only the accounting officer, as set forth above.

You also submitted a requisition for batteries which

were purchased by the Fire Department early in 1914. As to these batteries, we are unable to find anything in the letter from the superintendent of machinery of the Fire Department which justified the purchase without a formal requisition and the securing of bids through your office. We recommend as to this item that the same be submitted to the Committee on Finance of the City Council in order that provision for the payment may be made in the Budget of 1917. The item does not come within either of those expenses pointed out above, where your duties do not require you to assume the responsibility for the purchase.

You have also submitted a requisition from the city physician amounting to \$15.89 covering a number of purchases from druggists. There is an item of \$1.85 for rubber stamps among these which should have been put through in the regular way, but as for the remainder of these items they come peculiarly within those emergency matters that we have spoken of. For instance, there is an item for antitoxin tetanus. It would be manifestly absurd to require the city physician to await the slow process of requisition, bids, etc., in order to purchase such an item as this when he finds it necessary in the performance of his duties. Consequently, if he sends in a batch of bills of the character of those which you have submitted, and accompanying same there is a letter explaining that the purchases were necessary on account of emergencies and that he could not wait for the purchase of same by the business agent, that would be sufficient to overcome any presumption of irregularity.

You have forwarded also a batch of bills for paving repairs attached to requisitions of the commissioner of gas and electricity. We find attached thereto an explanation by the commissioner to the effect that these repairs were made while the Standard Paving Company was doing the paving on the street in question. It would seem as though this was a sufficient explanation of the reason for giving the work to the company that has made the repairs and turned in bills for same, since this was the company that was doing the work of paving.

With respect to the labor and material necessary for bell-brackets, sounding mechanisms, etc., for the Department of Fire, there is a letter of explanation from the fire marshal stating that the requisition did not go through the purchasing agent's office as the result of an oversight or accident. It would seem as though this explanation is sufficient to warrant your passing same, since there would be no purpose in sending the matter back, especially in view of the fact that it would be necessary to place the order with the same concern and the price would be identically the same.

With reference to the clock for the corporation counsel—it appears from your letter that word was sent to the corporation counsel to secure a clock such as he desired, inasmuch as one that was delivered before that time by Marshall Field & Company was inaccurate and was returned. Such clock having been purchased by the corporation counsel from Spaulding & Company, and it being one on which competitive bids would mean very little by reason of the fact that accuracy rather than cheapness was the desideratum, we can see no reason why your consent to such purchase should now be withdrawn or why you should fail to honor a requisition for same after the purchase has been made in compliance with your suggestion.

The last one of the requisitions submitted is from the Bureau of Engineering, which calls for \$289.15 for work to take up and replace pavement. Attached to same are the bills of the Chicago Surface Lines and a letter of explanation from the commissioner of public works to the effect that the work was within the right of way of the Chicago Surface Lines and that such work is always performed by that company's men. The work was in connection with the utility gallery at Madison & Canal streets. This necessarily comes within the class of expenses for which no competitive bids can be secured, and the explanation of the commissioner of public works is sufficient to constitute authority for passing the requisition.

We have expressed our opinion in detail as to each of the items you submitted, besides making some general obser-

vations concerning your duties, in order that you may understand fully our view in regard to these matters.

We believe that the illustrations furnished by the requisitions that you asked us about will serve as a guide to such matters and will indicate our opinion as to same in all cases.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Personal Property Turned in On Account of Purchase Price.

January 4, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

In looking up the question as to the right of city officials to turn in personal property on account of the purchase price of other personal property which is purchased to take the place thereof, we are confronted with three sections of the statute, which read as follows:

“378. CITY COUNCIL OR BOARD OF TRUSTEES MAY PASS ORDINANCE TO SELL REAL OR PERSONAL ESTATE NO LONGER NECESSARY.) § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city or village incorporated under any general or special law of this state, which shall have acquired or hold any real or personal estate for any purpose whatsoever, is hereby authorized and empowered by ordinance passed by three-fourths of the members of the City Council of any such city, or of the Board of Trustees of any such village, at any regular or at any special meeting called for such purpose, to sell such property when the same shall, in the opinion of such majority of such City Council or Board of Trustees, be no longer necessary, appropriate or required for the use of such city or village, or profitable to, or its longer retention be for the best interests of, such city or village.

“379. WHAT ORDINANCE SHALL SPECIFY—NOTICE OF SALE—OPENING OF BIDS, ETC.) § 2. Such ordinance shall

specify the location of such real or personal estate, and the use thereof, of whatever kind the same may be, and before any sale shall be made under or by virtue of any such ordinance, by the City Council of any such city, or the Board of Trustees of any such village, such ordinance and proposal to sell shall be published in one of its daily or weekly papers for a period of not less than sixty days, and if no paper be published in such city or village, then it shall be published in some paper of general circulation in this state nearest to such city or village. Such notice shall contain an accurate description of such property, the purpose for which it is used, and at what meeting the bids will be considered and opened, and shall advertise for sixty days for bids therefor. All such bids shall be opened only at a regular meeting of such City Council or Board of Trustees, and shall be accepted only upon a vote of three-fourths of the members of such City Council or Board of Trustees: *Provided, however*, that the City Council or Board of Trustees may, by a majority vote, reject any and all bids.

“380. BY WHOM AND WHEN CONVEYANCE TO BE MADE.) § 3. Upon any bid having been accepted, and the purchase price duly paid or secured, the mayor and city clerk, or the president of the Board of Trustees and the clerk of such board, shall have the power to convey such real or personal estate and transfer the same to such party or parties whose bids have been accepted, by proper deed or deeds of conveyance, stating therein the price therefor, with the seal of the corporation.”

(Hurd's Rev. Statutes 1915-1916, Chap. 24, Paragraphs 378, 379 & 380, pp. 416 & 417.)

We are informed that in consequence of this statute the city is greatly handicapped in disposing of personal property which it no longer needs; that, in fact, the city realizes to a large extent only junk values for such property.

Therefore, we suggest for your consideration whether or not the Legislature should be requested to repeal or amend these sections of the statute so that the City Council shall be vested with the power to provide for the disposition of personal property which is no longer needed without being bound by such rigid requirements as are contained in the foregoing statute.

We have been advised, as before intimated, that practical experience has demonstrated that when such property is disposed of in compliance with the statute it brings little more than junk values, and it seems to us that if the City Council were vested with the full control of the subject some way could be devised for handling such property in a more businesslike and efficient way.

Yours very truly,
CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Use on Telephones of Device Known as Intensaphone.

January 6, 1917.

HON. JOHN P. GARNER, Commissioner of Public Service.

Dear Sir:

We have at hand your communication of November 27th, relative to the device known as the "Intensaphone," in which letter you request an opinion as to whether or not the use of this apparatus will be in violation of the rule of the Chicago Telephone Company,—that no electrical or mechanical connections or apparatus shall be used by the subscriber in connection with the telephone instrument supplied by the company.

The rule specifically states that "The subscriber shall not make, permit or use any electrical or mechanical connection or apparatus with the lines or equipment furnished by the company without the company's consent." The regulation is rather broad and seems to include all apparatus either electrical or mechanical which may connect with the lines or the equipment of the company.

The Intensaphone, as I am informed, is an arrangement purely mechanical, not having any electrical connections with either the line or the equipment, and while it is mechanical, yet in its use it touches only the diaphragm end of the receiver, being held in contact therewith by the hand, but not in any way that it would cause injury to the instrument or impair the service. The only purpose served by the Intensa-

phone is, as its name indicates, to intensify the sound by transmitting it to both ears of the person listening, and by excluding all outside noises.

Inasmuch as its application to the telephone equipment and line does not make a direct electrical or mechanical connection to any of the apparatus or lines, or in my opinion in any manner impair the service, I believe that the rule of the company is not applicable to such an apparatus as the "Intensaphone."

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Ownership of Telephone Poles.

January 9, 1917.

HON. WILLIAM G. KEITH, Commissioner of Gas & Electricity.
Dear Sir:

We are in receipt of your letter of recent date relative to the various requests of the Chicago Telephone Company asking that the City of Chicago remove its wires from the poles of the Chicago Telephone Company in certain localities where the Chicago Telephone Company is no longer using the poles for its own business, or in lieu thereof that the city assume ownership of said poles, and in reply to your question as to the liability in the event of accident or damage, we beg to say:

The duty of maintaining the poles in a safe condition is, primarily, upon the owner of the poles, "The Chicago Telephone Company," but inasmuch as there is also a duty upon the municipality to protect its inhabitants in the use of the streets and highways from accident or injury, and inasmuch as the city is in possession of or the sole occupant of the poles in question, and also have knowledge of the unsafe conditions of said poles at the present time, it is our opinion that the

City of Chicago could be held responsible for any accident or injury that might occur to third parties, resulting from any such pole not being kept in a proper state of repair.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Alleged Infringements of Patents on Bridges.

January 12, 1917.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your communication relative to the claim of Herman C. Krase on account of alleged infringement of patent in use of wheel locks on the Lake Street bridge.

Your communication, together with memoranda, was referred by this office to Messrs Dyrenforth, Lee, Chritton and Wiles, patent attorneys, for their opinion regarding infringement complained of, and they submitted the following as their conclusions:

“We are returning herewith the papers handed to us by Mr. Cleveland, relating to the claim by Herman C. Krase, 1539 South Spalding avenue, Chicago, Illinois, for compensation from you because of the alleged infringement by you of his patent No. 1,042,238, in the new bridge at Lake street.

“We have obtained a copy of the Krase patent No. 1,042,238, granted October 22, 1912—Lock for Bascule Bridges—and also a blue-print showing the construction of this Lake street bridge in so far as the alleged infringement is concerned. This blue-print last mentioned and the printed copy of the Krase patent are also returned herewith, so you may have the entire situation before you.

“Briefly speaking, the Krase invention consists in a locking device for the outer or rear end of the cantilever arm of a bascule bridge, it being the purpose of the locking device to positively maintain the bridge in a horizon-

tal position. The specific object of the Krause invention was to provide such a locking device which would be effective for his purpose and which could be easily withdrawn from the arc of movement of the bridge when the latter was to be opened. To accomplish this object the patentee provided a locking member in the form of a toggle-joint having one end carried in a fixed pivot as, for instance, on the bridge abutment and the other end adapted to engage the swinging bridge section. The patentee broadly claims his combination of parts in claim 1 of his patent. In claim 2 of his patent he defines the same combination with the addition of means for flexing the central portion of the toggle-joint. In claim 3 of his patent he more specifically defines the flexible means as comprising a certain screw arrangement. In claim 4 a specific means for flexing the joint is not described but there is set forth a particular construction for limiting the pivotal movement of the two arms which make up the toggle.

"It seems to us quite clear that the construction shown in the accompanying print of the Lake street bridge embodies the general principles of the Krase invention.

"The construction shown in the blue-print referred to clearly comes within the language of claims 1 and 2. It does not infringe claim 3 and it is doubtful whether it infringes claim 4, the question as to claim 4 being as to the interpretation which the court might put upon the specific definition of the shoulder-motion limiting means in this claim.

"As to whether or not these claims are valid for what they purport to cover, we have no means of determining, as no prior art has been exhibited to us. Mr. Krase tells, however, that no conflicting patents were encountered in the prosecution of his application, and from the breadth of claim 1 we think this quite probable. It is probable therefore that these two claims are valid to the extent that they cover the construction shown in this blue-print and, if so, the court would hold the patent infringed.

"Mr. Krase also tells us that his invention was incorporated in the plans for this bridge, by the engineers of the bridge department, with full knowledge that it was his invention, and that it had been patented to him. This would render it all the more difficult for the city to have the patent held invalid if a suit for infringement were brought against the city, though his acquiescence

in the use by the city of the invention on this bridge would probably prevent an injunction being granted in any such proceeding to restrain the city from continuing the use of this invention in this bridge.

"The only way in which we can give you an opinion as to the validity of these claims is to have a validity search made in Washington. If this be done, we can then examine the prior art disclosed by the search and render an opinion to you, based upon this prior art, as to the validity of the claims here involved. Such a search would cost considerable, depending on the amount of time required to make it, and it might well cost \$500 to \$600, possibly more.

"Mr. Krase is willing to license the city to use this invention in the Lake street bridge for a consideration of \$400, and in bridges subsequently built for the consideration of \$200 per bridge. If some arrangement is not entered into by you an infringement suit will be instituted, which would necessitate a validity search (before the answer could be prepared and filed) and a proper defense. To properly defend a suit of this character, if prosecuted vigorously, would entail an expense of \$2,000 or \$3,000, at the least, so it would seem, from the standpoint of economy, that the city could better afford to enter into some such arrangement as Mr. Krase outlined to us in our last conference.

"The question will naturally arise in your mind as to whether the city, in future business, cannot evade this construction and thus avoid the payment of a future royalty, even though you decide to settle with Mr. Krase for the use of his invention in the Lake street bridge. To evade claim 1, the broadest claim in the patent, it would not be safe to do anything less than dispense with the toggle lock absolutely, and substitute some construction working on a wholly different mechanical principle.

"If you decide, after further consideration, to have a license contract prepared, please return these papers to us and we will have pleasure in closing the deal for you."

We have examined the foregoing opinion and concur in the recommendations made therein.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Signature of Mayor on Bonds.

January 16, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir :

In response to your inquiry as to what can be done to lessen the task of signing bonds now imposed on the mayor of the city, we beg to state that there is now in force an ordinance which aims to relieve the mayor of the necessity of affixing his sign manual on licenses, permits, contracts, local improvement bonds and other written instruments now required to be signed by the mayor. (See Council Journal of Feb. 8, 1915, p. 3178.)

This ordinance was passed after an investigation had been made for the purpose of ascertaining whether it would be practicable to issue corporate bonds without the sign manual of the mayor. There was no doubt as to the law on the subject. Such bonds can be issued in any form that the City Council prescribes, and if the City Council should designate some other person as the one to sign on behalf of the city, the bonds would be valid.

With this purpose in view, the writer took the matter up with Messrs. Wood and Oakley, who represent and pass on the validity of bonds for bankers and brokers generally and whose opinion as to same is regarded very highly by bond-buying houses.

Mr. Wood stated that he quite agreed with the writer that there was no legal objection to doing what was proposed, but he said there was a commercial obstacle which should be taken into consideration. His view was that if the regular corporate bonds of the city were issued without the sign manual of the mayor appearing thereon it would affect the desirability of such bonds and possibly even their market value. He stated further that he would be besieged with letters of inquiry from all over the country, and that persons buying such bonds would perhaps get the impression that the entire credit of the city was not pledged unless such signature appeared. He also stated that it would be a complete

reversal of form and precedent, and that every governmental authority in the country, except the United States Government, issued its bonds with the signature of the chief executive thereon.

After having this conversation with Mr. Wood, the writer ascertained that the bonds of the City of New York do not bear the signature of the mayor, and again took the matter up with Messrs Wood and Oakley by writing to them. A reply was received stating that while there was no legal requirement making the manual signature of the mayor necessary, custom demanded it, and it would only be making trouble for the future to omit it.

Since these matters were discussed with Messrs. Wood and Oakley, the practice of selling bonds direct to the public at the office of the Comptroller has grown to such an extent that practically all the corporate bonds of the city are sold that way. The comptroller informs us that the objection that would be urged by bond-buying houses represented by Messrs. Wood and Oakley, or other attorneys who would examine the bonds for them, would not be considered a disadvantage or even noticed by the buyers of bonds who appear at the window of the comptroller's office and who hardly ever even ask to see the opinion of lawyers that have examined same. Consequently, the objection that existed a short time ago is now practically done away with, and, if it is desired, all ordinances passed in the future authorizing the issuance of corporate bonds can provide for affixing the signature of the mayor, either by him in person or by some officer or agent to be designated by him. In this way it would be possible to issue most of the bonds without the sign manual of the mayor, and in case it should become necessary to sell a large number in bulk to some regular bond-buying house those could be signed by the mayor. It is not possible, however, to change the method of signing as to the bonds that have been authorized up to the present time, because the ordinance in each case has provided for the form of same and has been submitted to the voters of the city for approval. These ordinances contemplate that the signature of the mayor should appear on the

face of the bond, although only facsimile signatures are required on the coupons. The result is that very little relief can be afforded the mayor for some time to come, as to corporate bonds.

So far as local improvement bonds are concerned, that subject was also discussed with Messrs. Wood and Oakley. As to these they stated that the objection which they urged in the case of corporate bonds did not apply, but that so far as their firm was concerned they would not recommend the purchase of these bonds unless the same were signed by some elective official on behalf of the city. Inasmuch as the city clerk would be expected to attest the seal of the city, there is only one other elective officer besides the mayor who could sign for the city, that is the city treasurer.

The ordinance to which we call your attention does not provide for the signature on such local improvement bonds by any other officer than the mayor, and if it is considered desirable to make a change in this respect it would be necessary to pass an additional ordinance providing for the signing of such bonds by the city treasurer.

At the time these matters were taken up with Messrs. Wood and Oakley several letters were received which were forwarded to the mayor. The writer stated in the letter forwarding same that he regarded the attitude of this firm as arbitrary in a certain sense and yet that their approval was most desirable in matters of this kind when a new policy is undertaken.

For your convenience, we attach hereto a copy of the ordinance of February 8, 1915.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Interest on Special Assessment Which Is Not Divided Into Installments.

January 19, 1917.

HON. CHARLES C. CASE, Assistant State's Attorney in charge
of County Affairs, County Building, Chicago, Illinois.

Dear Sir:

Some time ago we were asked to state to the County Clerk and to the County Collector whether it was the desire of the city's officers to have interest added in cases where special assessments which were not divided into installments went to judgment and the sale was deferred by the withdrawal of same while the sale was in progress.

Letters were sent to the County Clerk and to the County Collector to the effect that interest should be added. Through the courtesy of your Mr. Higgins, the writer was informed that a request had been made on you to give an opinion as to the legality of adding interest in such cases, and further that you are about to render an opinion to the effect that the addition of such interest would be unlawful. We trust that before you forward such an opinion, you will give consideration to what we state in this letter, inasmuch as we believe that such an opinion would be contrary to the best authorities that we have been able to discover on this point.

We understand that the adverse opinion is based principally on two points. First, the provisions of Section 72 of the Local Improvement Act as amended; and, Second, the decision of the Supreme Court in the case of *Murphy v. People*, 120 Ill. 234. Section 72 of the Local Improvement Act, as amended in 1913, added the following to what was formerly in the section:

“Any municipal corporation which holds any certificates of sale or tax deed acquired in pursuance hereof shall be entitled to reimbursement of the amount paid by it at such sale, including the costs and interest at the rate of five per cent (5%); and no final judgment or decree shall be entered in any case either at law or in equity or in proceedings under the eminent domain act involving the title to or interest on any land in which such

municipal corporation shall be a party, until reimbursement has been made to it as herein provided.”

This provides that the interest at the rate of five per cent, which a municipal corporation would be entitled to, shall run from the time of the sale. The fact that there would be an interregnum between the time of judgment and time of sale is regarded by your Mr. Higgins as fatal to the theory that we advance that this judgment must bear interest the same as all other judgments.

We believe that this point would admit of argument if this provision of the statute were still in force. But we do not deem it necessary to go into this matter because this new provision was held unconstitutional in *City of Chicago v. Gage*, 268 Ill. 232. By that decision the clause above quoted is wiped out and the section remains as it was before, simply permitting municipalities to become purchasers at tax sales. This disposes of one of the points made, and we trust that no opinion will be rendered adverse to the city by reason of anything contained in the part of Section 72 which has been declared unconstitutional, since at best the enactment of the amended section could only be regarded as a legislative interpretation, and it is doubtful whether the interpretation placed on it is the correct one.

As to the case of *Murphy v. People*, 120 Ill. 234, the only thing decided there is that no interest can be added in at the time of the judgment unless the statute specifically provides for interest. It does not even touch the question of the interest which begins to run after the judgment is entered.

This case is referred to and quoted from in a note which appears in 6 L. R. A. (n. s.) 694, in which the editor cites and quotes from a large number of cases to the same effect, but when he gets through with these cases we find the following:

“But, while taxes do not ordinarily bear interest prior to judgment unless expressly so provided, a judgment for taxes bears interest from the date of its rendition like any other judgment.”

In support of this he cites the following cases:

U. S. Trust Co. v. Territory, 10 N. M. 416.

Wheeling & L. E. R. Co. v. Wolfe, 13 Ohio C. C. 374.

St. Joseph v. Forsee, 110 Mo. App. 237.

People v. Central P. R. Co., 105 Cal. 576.

State v. Southwestern Railroad, 70 Ga. 11.

In some of these cases it will be noted that the court held expressly as was held in the Murphy case and made the distinction that we are insisting on.

We find authority for our contention also in 37 Cyc. 1254, wherein it is stated in the text that: "The judgment in a tax suit will bear interest from the date of its rendition the same as other judgments."

In support of this text the authorities given above are cited and in addition thereto:

McCombs v. Rockport, 14 Tex. Civ. App. 560.

There does not seem to be a decision on the precise point in this state, but we believe the case of *Carrington v. The People*, 195 Ill. 484, leans strongly towards our position in distinguishing that case from the case of *Greenwood v. Town of LaSalle*, 137 Ill. 225. We also regard the case of *Swinney v. Beard*, 71 Ill. 27, as favorable to our contention.

In view of the fact that there is no direct authority on the point in this state and that there is considerable authority for our position, as will appear from the above in other states, we believe that it would be proper to give the city the benefit of the doubt, if any exists. We feel convinced that the two different acts (Chapters on Judgments and Interest) which authorize the collection of interest on judgments are sufficient to warrant our conclusion in the absence of any decision in the state that is precisely in point.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Display of Papers from News Stands.

January 20, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

In reply to your letter of the 18th instant wherein you inquire whether under Section 2471 of The Chicago Code of 1911 operators of news stands are obliged to display for sale *all* daily newspapers printed and published in Chicago, we beg to say:

Said Section 2471 reads as follows:

“The commissioner of public works is hereby authorized to permit stands to be maintained on the public streets, between the hours of five a. m. and eight p. m., which shall be used for the purpose of exhibiting for sale daily newspapers printed and published in Chicago. Such stands as authorized shall not exceed three feet six inches in height, twenty-two inches in width and fourteen inches in depth, and nothing shall be exhibited, offered or sold therefrom except daily papers as above described. All such stands shall be removed at the discretion of the mayor or commissioner of public works.”

We think under this ordinance the operator is the judge of what papers he will sell subject to the requirement that “nothing shall be exhibited, offered or sold therefrom except daily newspapers as above described.” In other words, the use of the stands is to be limited to such daily newspapers, but there is nothing in the ordinance which requires the operator to keep all the daily papers thereon.

It has been claimed that under this ordinance the publishers of weekly papers like the Saturday Evening Post, have a right to have them kept on the stand, but we are of the opinion this claim is not well founded.

Curtis Publishing Co. v. City of Chicago, 273 Ill. 373.

Very truly yours,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Laying Off Employees in Department of Health.

January 20, 1917.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

You submitted to us a form of order designated as Bulletin No. 2 and form of waiver to be used by you for purposes of laying off employes in order to effect the saving required by the City Council during the month of January, and you ask whether there is anything illegal in such a plan as you have outlined therein.

Your plan in brief consists in laying off an employe for a period of three days but requesting him at the same time to keep at work during such period in order that the work of the department may not be crippled at this time of the year when such work is needed. It is proposed to give credit for these three days in the shape of overtime for which the employe will be allowed to lay off later on while his pay is going on. In short, what the whole thing amounts to is that instead of a complete lay-off without pay at the present time you defer the laying-off until some future time but deduct the pay at the present time.

The only objection there could be to such a course would be if the City Council fails to appropriate for any of these parties who would have performed work, and who agreed to work and to have the same regarded as overtime, they would not be in a position to recover. We are of the opinion, however, that your form of waiver would do away with any liability so far as the city is concerned.

Under the opinion of the Supreme Court in the case of *Thomas v. City of Chicago*, 273 Ill., it was held that where a lay-off of less than thirty days was made in a department for the purpose of necessary retrenchment and not for the purpose of evading any civil service law or rule such action cannot be set aside as illegal. Consequently, we see no objection to the plan that you have outlined.

Yours respectfully,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*SAMUEL A. ETTELSON,
Corporation Counsel.

Purchase of Outstanding Judgments.

January 25, 1917.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

We are in receipt of your communication in which you asked if the city can legally invest in the purchase of outstanding judgments against the city its surplus moneys which are not immediately necessary.

We understand that the surplus moneys herein referred to, are moneys credited to the Water Fund, the Sinking Fund of the World's Fair, and other bond issues. This also would include the money in the Traction Fund.

The statutes contemplate that all public funds should draw interest, and in the case of the city's funds, provide a method for depositing them so as to secure the best rate of interest obtainable from regularly constituted National and State banks. Aside from that, there is provision made in the statutes for using money in sinking funds in excess of the amount required for meeting maturing bonds during the current or succeeding year for the purchase of outstanding bonds of the particular issue for which such sinking fund is being accumulated. There is also provision for using money in any fund set aside for some particular purpose which is not required immediately for the purpose of tax anticipation warrants of the municipality.

While there is no provision of the statute which forbids the investment of funds of the city, the fact that the uses above mentioned are so specifically provided for, under a familiar canon of construction, is held to mean that all other methods of investment are precluded. Moreover, there have been decisions prior to the enactment of the statutes referred to above which were looked upon as prohibiting any use of such funds except as the statutes may expressly permit.

People ex rel. City v. Hummel, 215 Ill. 43.

Same v. Same, 215 Ill. 71.

We are constrained to hold that the foregoing restrictions apply to the moneys in the World's Fair Bond Issue

Sinking Fund and other bond issue sinking funds, to the Water Fund, and to all other funds accumulated under statutory authority. We do not believe, however, that the same rule applies to the Traction Fund, which is not a statutory fund and which stands on a different footing entirely.

The traction ordinances under which the fund in question is created provide that the money shall be expended only for specific purposes mentioned therein. These are of such a nature that the bulk of the fund cannot be expended for some years to come. Consequently, while this fund is inactive the city stands in the relationship of a trustee to it. As such trustee it is bound to so handle it as to make it productive. This is the rule in all cases where a trust fund is to be held for a considerable length of time. There is no exception even in the case of a municipal corporation, nor in the case of the secretary of the treasury of the United States when he is made the trustee.

Muskegon Traction & Lighting Co. v. City of Muskegon, 167 Mich. 331, 338.

Sinking Fund Cases, 99 U. S. 700, 725.

Hence, the only question presented is whether the city is bound by the limitations imposed on municipal corporations in such a way that it cannot employ the money as other trustees would be obliged to employ it.

The traction fund having been created by ordinance differs materially from funds created by statute, such as sinking funds, pension funds, the water fund and others.

The city, in passing the contract ordinances under which the traction companies operate, reserved entire control of the traction fund of the city. It was therefore unnecessary to insert any provision relating to the investment of same.

This fund stands out distinctly as a different kind of fund than any of those created by statute, and is not affected by either the provisions of the statute or the decisions which interpret them. Such being the case, the rule governing the handling of trust funds must apply.

Authorities are not wanting to sustain our position in this respect.

In McQuillin on Municipal Corporations, Section 2163, the author uses the following language and supports same with numerous decisions:

“Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute.”

To the same effect are the following:

Foot v. City of Salem, 96 Mass., (14 Allen) 87.

Commissioners v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

Sinking Fund Cases, 99 U. S. 725.

We are therefore of the opinion that the City Council will be acting within its powers, if it authorizes the use of money in the traction fund for the purpose of purchasing outstanding judgments against the city.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Removal of Obstructions at Franklin-Orleans Street Bridge.

January 25, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of a communication from the former commissioner of public works on the recommendation of the city engineer concerning the occupation of a part of the river near the proposed Franklin-Orleans street bridge which will be required for bridge abutment. Accompanying same is a drawing showing that there are some tugs, a scow and a floating dock there, but there is nothing which indicates that these are anything but water craft which can be readily removed and relocated at some other place.

You ask what the necessary steps are which must be taken to secure all rights to occupy this river space for the bridge abutment.

We assume that your question has reference more particularly to the removal of the floating craft and not to any riparian rights of owners. We therefore see no difficulty in obtaining the site as soon as you require it for purposes of building the abutments.

With respect to ordering such vessels away, we suggest that you serve notice on the owners or persons in charge of same at once, giving them a reasonable time to find some other place for mooring same.

Section 1097 of The Chicago Code of 1911 defines the harbor, and the provisions in regard to encroachments thereon will be found in Sections 1125 to 1129 inclusive and 1135 to 1141 inclusive. Sections 1137, 1138 and 1139 provide especially for the removal of any vessel, craft or float which interferes in any way with the free use of the river or the interruption of traffic, and they give the harbor-master power to remove same in case they are not removed on notice, at the expense of the owner. Section 1139 further provides that if any person shall resist the harbor-master in the execution of his duty of removing same, he is liable to a fine.

We suggest, therefore, that notices be prepared at once to be served on masters, owners or persons in charge of such vessels, crafts or floats as are in the way. The ordinance (Section 1138) provides that if no person of that description can be found the harbor-master may remove the vessel without notice, but inasmuch as the season of the year is such that parties using or occupying such crafts may not be there continually, we recommend that a copy of the notice be fastened on the craft, if no person is in charge, so that it can be seen by the proper parties when they appear. A ten days' notice would seem to be sufficient, although you can make the time longer if you believe it would be proper to do so.

Yours very truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Salaries of Certain Officers.

January 30, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We direct your attention to Section 1641 of The Chicago Code of 1911, which reads as follows:

"All officers appointed by the mayor by and with the advice and consent of the City Council, whose term of office is not otherwise expressly provided for by law, shall be appointed on the first Monday in May next succeeding the general election for mayor, or as soon thereafter as is practicable, and shall hold their respective offices during a term of two years and until their successors are appointed and qualified."

As bearing upon this, we quote from Section 11 of Article IX of the Constitution of 1870 the following:

"The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term."

Pursuant to the above provision of the Constitution, Section 15 of Article VI of Chapter 24 of the Revised Statutes (Hurd's Stat. 1915-6) referring to officers other than mayor and aldermen, reads as follows:

"All other officers may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed, such fees or compensation shall not be increased or diminished, to take effect during the term, for which any such officer was elected or appointed; and every such officer shall make and return to the mayor, or president of the board of trustees, a semi-annual report, verified by affidavit, of all such fees and emoluments received by him."

Section 1646 of The Chicago Code of 1911 reads as follows:

"The salaries or compensation of all officers, clerks and employes of the city shall be determined and fixed by the City Council in the annual appropriation bill."

But Section 1648 provides:

"The annual salaries of the mayor, city clerk, city

comptroller, city treasurer, city collector, city electrician, corporation counsel, prosecuting attorney, commissioner of buildings, commissioner of public works, commissioner of health, fire marshal, general superintendent of police, business agent and city physician, are hereby fixed as follows, to wit:

"Mayor	\$18,000.00
City clerk	5,000.00
City comptroller	10,000.00
City treasurer	12,000.00
City collector	6,000.00
City electrician	6,500.00
Corporation counsel	10,000.00
Prosecuting attorney	4,500.00
Commissioner of buildings.....	6,000.00
Commissioner of public works.....	10,000.00
Commissioner of health.....	8,000.00
Fire marshal ..	8,000.00
General superintendent of police....	8,000.00
Business agent	6,000.00
City physician	4,000.00"

Each of the officers above listed except the mayor, city clerk, city treasurer, and possibly the prosecuting attorney, come within Section 1641 above quoted, which provides that they "shall hold their respective offices during a term of two years and until their successors are appointed and qualified;" and the mayor, city clerk and city treasurer are elective officers.

In *City of Roodhouse v. Johnson*, 57 Ill. App. 73, it was held, as stated in the second syllabus, that under the constitutional provision above quoted:

"An ordinance providing that the city attorney shall receive five dollars per month, payable monthly, passed during the term of that officer, does not take effect so as to diminish his salary, but does that of his successor in office, and as such is a valid ordinance."

Thus, if the present proposed draft of the annual appropriation bill should be passed in its present form, it would be in defiance of the constitution in so far as it attempts to reduce the salaries of the officers above named, and in that respect would be a mere nullity.

The official designation of the officer above mentioned as "city electrician" is now "commissioner of gas and electricity."

There have been some amendments to Section 1648, *supra*, but none which are material to the point under consideration.

Very respectfully yours,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Provisions in Appropriation Bill Restricting the Powers of the Board of Local Improvements.

February 5, 1917.

HON. JAMES H. LAWLEY, Alderman 14th Ward.

Dear Sir:

In response to your verbal request for an opinion as to the legality of certain provisions restricting the powers of the board of local improvements in the appropriation bill for the year 1917 passed by the City Council, we beg leave to submit the following:

The particular provisions referred to consist of a clause at the end of the appropriations for widening East and West Twelfth street, making it incumbent on the board of local improvements to secure the approval of the comptroller before incurring expenses in relation thereto, a clause requiring the said board to advertise before letting the work of court reporting in the trial of the case involving the North Michigan avenue improvement, and the following clause which is appended to a number of appropriations for the last mentioned improvement:

"No expenditures shall be made nor liabilities incurred against this account unless same have been approved by the City Council."

The authority to make the expenditures in question is vested in the board of local improvements by that part of Sec-

tion 83 of the statute concerning local improvements, which reads as follows:

“The board of local improvements in cities of one hundred thousand (100,000) inhabitants and over, according to the last census as hereinbefore provided, may appoint an attorney for the board who shall have charge, under its direction and control, of all legal matters pertaining to the board of local improvements, the confirmation of special assessments and the collection of the same. It may also appoint an engineer for the board, and such assistant attorneys, engineers, clerks, inspectors, etc., etc., as may be necessary to carry into effect the purposes of this act.”

In view of the plain provisions of the statute above set forth there is no doubt that the City Council cannot legally, through the medium of an appropriation bill, usurp the powers and functions of the board of local improvements.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Power of City to Operate Telephone Plant.

February 7, 1917.

HON. JOHN SIMAN, City Clerk.

Dear Sir:

We are in receipt of your letter of January 22d, enclosing resolution by Alderman Coughlin and requesting an opinion as to whether the enabling act of 1913 gave the City of Chicago power to own and operate a telephone plant of the kind referred to in said resolution, or in the event that the city has not the power sufficient to operate the telephone plant, that we draft and submit a bill for an act sufficient to empower the city to own and operate such plant.

In reply thereto, we beg to state that in 1913 the Legislature enacted a law relative to public utilities by the terms of which “any city in this state shall have the power, subject

to the provisions of this act, to acquire, construct, own and operate any public utility the * * * service of which, * * * is to be supplied to the city or its inhabitants," etc.

The act defines public utility to "mean and include any plant, equipment or property, and any franchise, license or permit, used or to be used for * * * the conveyance of telegraph or telephone messages," etc.

Under Section 4 the act requires that "no city shall itself proceed to operate any such public utility for the use or benefit of private consumers or users, for hire or charge for such compensation or use, unless the *proposition to operate* shall first have been submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon."

From the foregoing it is apparent that the enabling act is sufficient to permit the City of Chicago to operate the telephone plant in question upon a submission to and approval by a majority of the electors voting upon the proposition to operate said utility.

Yours very truly,

DANIEL A. ROBERTS,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Bond for Electric Light Extension Contract.

February 9, 1917.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your letter of recent date in which you state that the contractors who contemplate bidding on work for the extension of the electric lighting plant of the city for the year 1917 have raised a question as to the amount of the bond which they will be required to furnish.

It appears that the total cost of this work for the year 1917 will be approximately \$2,305,000. Under the strict letter of the ordinances relating to the letting of such contracts a bond of about \$775,000 would have to be given.

You state that it would be exceedingly difficult, if not impossible, for the various parties who desire to bid to secure bonds for so large an amount, and intimate that the city's interests may be seriously jeopardized by the elimination of many, if not all, of the contractors who intend to bid.

You suggest a way in which there might be a substantial compliance with the city ordinances and ask for our opinion as to whether you can proceed in accordance with your plan. We have considered this plan and believe that it is based on a sound theory and may be safely followed without either violating the ordinances or entailing any risk on the city.

You state that it is planned to accept bids from the contractors on the specifications on a unit cost basis and that the work will be divided so that it will be done in different districts designated respectively, "P," "C," "H" and "N," which are to be done in 1917 and one which is designated "O" to be done in 1918. Further, that the work will start in the northwest or "P" district and be practically completed therein before work is started in any other district. In other words, that instead of there being one improvement there will be a succession of improvements, so that if a bond is taken sufficient to cover $33\frac{1}{3}$ per cent of the value of the work in the first improvement, but at the same time extending over the whole contract, there will be in effect at all times a bond covering the improvement that is under construction which complies with the requirements of the ordinance.

It further appears, that the total value of the work in the "P" district is approximately \$826,000; in the "C" district \$624,000; in the "H" district \$142,000, and in the "N" district \$685,000. A bond of \$330,000 as suggested by you would therefore be ample for the "P" district or for any of the others if the work was done and contracted for in each case as an individual district.

There can be no question that the acceptance of a bond of less than one-third of the total amount of the work would

be improper if the work consisted of one unit or improvement only. But there does not seem to be any good reason for applying the provisions of the ordinance so rigidly in a case where the work consists of a succession of units which cannot be under construction all at one time. Especially is this true where the first one is by far the largest so that a bond based on that unit will be more than ample for any of the other units. We regard such a progressive contract as you have outlined as one very much in the nature of a contract for supplies, which does not necessarily require so large a bond as where the improvement or work must be delivered complete in all its parts.

We are therefore of the opinion that in view of the peculiar circumstances of this case you would be justified in fixing the requirement for the bond in accordance with the approximate value of the work in the largest district. We beg to caution you, however, to the effect that the bond must be so written and entered into that it will cover all of the work to be done and for that purpose it would be well to treat the different units collectively as one job, although they should be specified in detail in the bond.

We beg further to advise you that this opinion should not be regarded as a precedent, being based on the conditions that exist in this instance which are peculiar and which may never arise again.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Auto Truck Licenses.

February 10, 1917.

HON. H. F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We desire to acknowledge receipt of your communication of the 19th inst., requesting an opinion relative to the use of

licenses used in connection with the demonstration of auto trucks.

From the communications you enclose, viz., a letter to the vehicle bureau from the Auto Car Sales and Service Company, also a letter from the vehicle bureau to the first deputy superintendent of police, we take it that you are familiar with the ordinances applicable to these licenses and are only interested in the question of whether or not the fact that a chauffeur, operating a car, carries with him what is termed a "demonstration order," a copy of which has been furnished us, is sufficient evidence of the fact that the car comes within the meaning of the ordinance as a car being used for demonstrating purposes.

Section 2720 of the code, as amended, is the section under which these particular kinds of vehicle tax licenses come, and the same does not provide for any special time that a car may be demonstrated to any particular person, firm or corporation.

The privileges extended under the provisions of the ordinance permitting dealers to use demonstrators' license tags have frequently been abused, and it is the duty of the police to make arrests where it appears to them that an improper use of same has been made. Under the circumstances mentioned proof of a character that satisfies the officer that there has been no misuse of a dealer's tag may be required. We do not believe it would be proper to limit this proof to any particular thing. Such a card as is proposed may be sufficient to convince the officer of the good faith of the parties using same if issued by a responsible concern that has never been suspected of evading the law. On the other hand, a card of this kind may be used for the express purpose of evading the tax.

Therefore, while the fact that a chauffeur is carrying one of these demonstration order blanks is one of the elements to be considered by the police officers in determining whether or not a car is being used for the purpose of demonstration, we do not think that this fact alone is conclusive.

We are returning herewith your communications.

Yours very truly,

W. H. DEVENISH,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City on Account of Use of Explosives by Other Parties.

February 13, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your communication of January 26th, enclosing Council Order and correspondence in relation to the claim of the Grocers Importing Company, 1120 Wilson avenue.

You ask that this claim be investigated and an opinion furnished your committee with regard thereto.

The formal claim of the Grocers Importing Company, which is dated November 2, 1916, and signed by a Mr. Buloma, alleges that damages amounting to \$150 were sustained in connection with its stock and fixtures, but no mention is made therein as to what caused the alleged damages. In investigating the matter, however, we interviewed Mr. Buloma (who informs us that he is the manager of Rosenheim's Market House Company, successors to the Grocers Importing Company) and were advised by him that some time in October or November, 1916, on arriving at the store in the morning on different occasions, he found glass, bottles and jars on the floor and in the window which were broken; that he set a trap, thinking this might have been caused by rats, but found that this was not the case and that the damage was caused by the shaking of the building resulting from blasting. He also asserts that at that time he spoke of the matter to Mr. Erickson, city engineer, and Alderman Link, and that Alderman Link offered to present a claim for him for damages, suggesting that \$75 ought to cover the same, to which Mr. Buloma agreed.

Our Supreme Court, in the case of *City of Chicago v. Thomas Murdock et al.*, 212 Ill. 9, held that while the principle of *respondeat superior* does not in general extend to work done by an independent contractor, yet if the contract requires the doing of work which is intrinsically dangerous, or if the work is done pursuant to a special franchise or charter power the rule of *respondeat superior* applies, and that it is a matter of common knowledge and universal experience that the use of dynamite as an explosive is intrinsically dangerous and courts will take judicial notice of the fact.

In the case of *The FitzSimons and Connell Company v. Braun & Fitts*, 199 Ill. 390, which involved issues similar to those in the above cited case, the court said that the liability for damages to property from the use of explosives is not confined to actual invasion of the property by rocks or other material being thrown thereon, but extends to damage done by the concussion or vibration of the earth or air.

In an assumed case approximating facts and conditions such as were involved in the adjudicated cases hereinbefore referred to, our opinion is that the city would be liable to respond in damages to the owner of the damaged property. However, in the specific claim under consideration, it resolves itself into a question of fact as to whether or not the alleged damage was the resultant effect of blasting in connection with work being done for the City of Chicago, and what actual amount of damage, if any, was done. We understand that the construction division of the bureau of engineering has heretofore investigated claims similar to this one, and has recommended settlements to your committee where the facts seemed to justify such action, and we therefore respectfully suggest that this matter be referred to it for an investigation, report and recommendation in the premises.

We are returning herewith council order and claim above referred to.

Very truly yours,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Boundary Line Between Chicago and Park Ridge.

February 15, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Attention of John D. Riley, Supt. of Maps.

We are in receipt of your communication of February 3, 1917, in which you ask the question, "Did the filing of the plat and certified copy of the original ordinance and recent resolution of the City Council of the City of Park Ridge complete the annexation of the territory known as Lot 1, Block 9, Town of Canfield, to the village then known as the Village of Park Ridge," and in reply we desire to say that the evidence which we have gathered in reference to this question is as follows:

The Village of Park Ridge was organized February 22, 1873, and its boundary line was defined, in part, as being the West $\frac{1}{4}$ of Section 36, Township 41 North, Range 12, East of the 3d Principal Meridian, in Cook County, Illinois, which did not include part of the property in question known as Lot 1, Block 9, on the recorded plat of the Town of Canfield, afterwards known as a part of the Village of Edison Park (now annexed to the City of Chicago).

On July 19, 1910, the Village of Park Ridge organized as the City of Park Ridge, and its boundary line was defined, in part, as the West $\frac{1}{4}$ of Section 36, Township 41 North, Range 12, and at the time of its organization the City of Park Ridge did not include Lot 1, Block 9, which is in the East $\frac{1}{2}$ of the West $\frac{1}{2}$ of Section 36-41-12.

On November 8, 1876, the Village of Park Ridge, before it was organized as a city, attempted to annex, by ordinance, Lot 1, Block 9, Town of Canfield, which was in the Township of Maine, but the president of the board of trustees of said village did not certify and record a copy of the ordinance with a map of the territory to be annexed, in accordance with the statute in such cases made and provided, nor was said ordinance certified until the 23d day of January, 1917, and only then by the city clerk of the City of Park Ridge (blue print

copy of the ordinance and the map is herewith attached), which said ordinance and map, however, have since been recorded in the recorder's office of Cook County.

Lot 1, Block 9, in Town of Canfield, was not an organized town under the laws of Illinois, but was known as a subdivision made by the Illinois & Wisconsin Land Company in 1858 which, prior to the attempted annexation by the Village of Park Ridge was resubdivided and made a part of a subdivision known as "J. T. James Addition to Park Ridge."

Section 1 of an act entitled, "An Act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," approved April 10, 1872, in force July 1, 1872, provides as follows:

"Sec. 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly.* That on petition, in writing, signed by not less than three-fourths of the legal voters, and by the owners of not less than three-fourths (in value) of the property in any territory contiguous to any city or incorporated village or town, and not embraced within its limits, the City Council or board of trustees of said city, village or town (as the case may be) may, by ordinance, annex such territory to such city, village or town, upon filing a copy of such ordinance, with an accurate map of the territory annexed (duly certified by the mayor of the city or president of the board of trustees of the village or town), in the office of the recorder of deeds in the county where the annexed territory is situated, and having the same recorded therein: *Provided*, that no portion less than the whole of an incorporated city, town or village, shall be annexed to another incorporated city, town or village, except in the mode provided in this act for the annexation of the whole of an incorporated city, town or village, to another city, town or village."

Revised Stat. of Ill., Cothran 1889, p. 265.

This was the law governing the annexation and exclusion of territory at the time of the attempted annexation of said Lot 1, Block 9, in the Town of Canfield to the Village of Park Ridge.

Under the above section, before any city, village or town desiring to annex any territory contiguous to any city, incor-

porated village or town, could make such annexation, it was necessary that a petition, in writing, signed by not less than three-fourths of the legal voters and by the owners of not less than three-fourths (in value) of the property in any territory contiguous to any village should first have been presented to the village authorities before the passing of any ordinance.

There is no evidence upon the records of the Village of Park Ridge that any such petition has ever been filed, nor is there any evidence predicated the passage of an ordinance by the board of trustees or showing that such a petition was ever filed. The ordinance referred to in the blue print attached does not state that any such petition had ever been filed.

In order to comply with said section it was necessary that the president of the board of trustees of the Village of Park Ridge certify to such ordinance, with an accurate map of the territory annexed attached, and file same in the office of the recorder of deeds in the county where the annexed territory is situated. This was not done, but on the 23d day of January, 1917, Harold W. Ward, city clerk of the City of Park Ridge, certified to the ordinance passed by the Village of Park Ridge on the 8th day of November, 1876, as being a correct copy of the original ordinance passed by the board of trustees, and also certified that a resolution had been passed by the City of Park Ridge that Albert Verity, the mayor of the City of Park Ridge, be authorized to approve a map or plat of said Lot 1 in Block 9, and cause the same to be recorded.

Section 1 of the act above set forth provides that the president of the board of trustees should certify to said ordinance with an accurate map, and there is no power or authority delegated to the mayor or the city clerk authorizing them to certify to any ordinance as passed by the village trustees in accordance with Section 1 above referred to, nor is there any law delegating any such power or authority to any city officials approving the acts which were not legally executed in compliance with the annexation or exclusion of territory to cities or villages.

We are, therefore, of the opinion, inasmuch as:

(1) The trustees of the Village of Park Ridge did not have a petition on file as required by statute prior to the passage of the ordinance of November 8, 1876;

(2) The village president did not certify to the ordinance and map in accordance with Section 1 of the statute above set forth;

(3) The City of Park Ridge, in its incorporation as a city, recognized the boundary lines of the Village of Park Ridge which did not include the purported annexed territory;

(4) The Village of Edison Park, when incorporated as a village recognized the boundary line as being identical with that of the Village and City of Park Ridge, and

(5) The said Village of Edison Park was annexed to the City of Chicago by an election held on November 8, 1910,

that the ordinance passed by the Village of Park Ridge and certified by the city officials of the City of Park Ridge, and recorded, was illegal and of no effect, and that the Village of Edison Park, as annexed to the City of Chicago, which includes the territory in question, is legally a part of the City of Chicago.

Very truly yours,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Powers and Authority of Retired Police Officers.

February 21, 1917.

MR. MATHIAS J. FRANZEN, President, Police Pensioners' Association, 2139 Hudson avenue, Chicago, Illinois.

Dear Sir:

We are in receipt of your communication of recent date asking us to advise you as to whether persons who have retired from the Police Department under Section 3 of the Police Pension Fund Act still have police power and are still authorized to make arrests, carry a revolver, etc.

In reply, we beg to advise you that Section 3 of the Police Pension Fund Act provides, in substance, that when a person has served on the police force for a period of twenty years he may make application to the pension board for retirement, and the said pension board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension equal to one-half the amount of the salary attached to the rank which he may have held in said police force for one year immediately prior to the time of his retirement from the police force.

No pension is granted to any applicant under Section 3 of the Pension Fund Act until his connection with the Police Department has been terminated, and upon his retirement from the Police Department he loses all the rights and privileges of policemen in active service and he has no authority to carry a revolver. He possesses only the same power to arrest persons as any other citizen may have under the law.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Lawfulness of Open Air Meetings.

February 21, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of February 16th, asking us to advise you as to whether or not there is any law preventing open-air meeting by persons who do not use coarse or profane language, do not make threats, do not advocate violence, and who conduct the meeting in an orderly manner.

In reply, we beg to advise you that Section 2433 of The Chicago Code of 1911 regulates the holding of open-air meet-

ings and processions, and all persons complying with the provisions of the said ordinance may lawfully hold open-air meetings. The following is a copy of the section in question:

“PROCESSIONS AND OPEN-AIR MEETINGS) No parade or procession shall be allowed upon any street or public way in the city, nor shall any open-air public meeting be held upon any ground abutting upon any street or public way in the city, until a permit in writing therefor shall first be obtained from the Police Department. Application to conduct such parade or procession or open-air meeting shall be made in writing to the general superintendent of police by the person or persons in charge or control thereof, or responsible therefor, and such application shall set forth the route along which such parade or procession is to proceed, the time of starting, and the name or names of the person or corporation or society in control thereof or responsible therefor, and the purpose of such parade or procession; and, in case of an open-air meeting, shall specify the place at which it is desired to hold such meeting, the purpose thereof, and the name of the person, corporation or society in control thereof or responsible therefor, the time at which such public meeting is to be held, and the probable duration thereof. Upon such application being made, the general superintendent of police shall investigate or cause to be investigated the person, corporation or society making such application and the truth of the statement made in such application regarding the purpose or object of such parade, procession or open-air public meeting, and if he shall find that such parade, procession or open-air public meeting is not to be held for any unlawful purpose and will not in any manner tend to a breach of the peace, or unnecessarily interfere with the public use of the streets and ways of the city or the peace and quiet of the inhabitants thereof, he shall issue such permit to the person, corporation or society making the application therefor, without fee or charge.”

You will observe from the provisions of the foregoing ordinance that application must be made to the general superintendent of police for a permit, and if the general superintendent of police, after investigation, is satisfied that the procession or open-air meeting is not to be held for any unlawful purpose and will not in any manner tend to a breach of the peace or unnecessarily interfere with the public use of the

streets and ways of the city or with the peace and quiet of the inhabitants thereof, a permit shall be issued, and processions or open-air meetings held or given by virtue of a permit from the general superintendent of police are legal and proper.

Yours very truly,
 JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Vacation of Alley.

February 23, 1917.

HON. JAMES A. KEARNS, Chairman, Compensation Committee.
 Dear Sir:

We are in receipt of your letter of the thirteenth instant, in which you request the legal status of the east and west alley in the block bounded by West Ohio street, North Halsted street, Milwaukee avenue and North Green street. In reply thereto we beg to inform you that the block in question was dedicated by plat December 9, 1879, and all the information we have been able to obtain from the Department of Public Works as to the acceptance of said block containing said alley is that a water main was laid in West Ohio street in 1884 and in North Halsted street in 1889, no improvements of any kind having been put in Milwaukee avenue or North Green street.

You state that the two-story building facing on Milwaukee avenue bears the date 1850, which would then have been constructed 29 years prior to the dedication. As the plat of dedication was filed in 1879 showing this stub-alley, it would indicate that the building constructed in 1850 did not cover same.

You also state that the addition to said building appears to have been constructed some thirty or forty years ago. Taking thirty years as a basis, as per your affidavit accom-

panying your communication, the extended building would have been across said alley in 1886, or two years subsequent to the laying of the water main in West Ohio street (in 1884), and three years prior to the laying of the water main in North Halsted street (in 1889). The building having been across said alley for more than thirty years shows conclusively that same has not been used as a public alley which would be evidence of the abandonment of same by the public. With the exception of the water mains laid in West Ohio street in 1884, there is no indication that the city accepted same.

Our Supreme Court, in the case of *Village of Auburn v. Goodwin et al.*, 128 Ill. 66, which is a similar case to the one in question, said:

“Mere non-user for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances; but if there has been, in the meantime, some act done by the owner of the land charged with the easement, inconsistent with or adverse to the right, an extinguishment will be presumed.”

* * * *

“Conceding this highway was laid out as claimed by appellant, and conceding there was an intention to dedicate the premises on the southeast of Section 4, we are of opinion that the adverse possession of appellee, open and exclusive as it has been, and the complete non-user of the easement by the public for more than twenty years, are a sufficient answer to the claim now made by the city.”

We are, therefore, of the opinion that the city has no valid claim in and to said alley, and even if there was evidence which would establish an acceptance on behalf of the city by the making of improvements in the streets or the usage of the same, the building having been constructed thereon and remaining so for the past thirty years, the city would be estopped by any action it may take, in the recovery of the same.

Yours very truly,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Motive Power for Operation of Railroads in Terminals.

February 26, 1917.

HON. ELLIS GEIGER, Chairman, Committee on Railway Terminals.

Dear Sir:

At a recent meeting of the railway terminals committee an ordinance was presented which was drawn by this office at your request, making it unlawful for any person, firm or corporation operating trains from any terminal station hereafter to be built to use, upon the completion of such terminal, any motive power for the operation of its trains that will cause smoke, soot, cinders and noxious gases of any kind to escape, and which further makes it unlawful, after the expiration of five years, to operate any suburban trains within the city limits, after seven years to operate any passenger trains, and after ten years to operate any trains of any kind, either freight or passenger, in such a manner that smoke, soot, cinders and noxious gases are allowed to escape therefrom, and at that meeting your committee requested the corporation counsel to furnish you with an opinion as to whether the proposed ordinance was valid.

As the ordinance was originally drawn, it read: "Smoke, steam or noxious gases," but it was changed in the committee to read: "smoke, soot, cinders and noxious gases." We respectfully suggest that the conjunction "and" be changed to "or" so as to read: "smoke, soot, cinders *or* noxious gases" in order to avoid legal complications.

The question of the right to compel the railroads of the City of Chicago to operate by means of power other than steam, or in a manner that will not produce smoke, soot, cinders or noxious gases, has been before the committees of the City Council for a number of years, and numerous opinions have been rendered by the corporation counsel, such opinions generally holding that the city has the right to compel the railroads to operate by means of power other than steam and in a manner that will not produce smoke or noxious gases.

Corporation Counsel Brundage rendered an opinion un-

der date of November 18, 1908, to Alderman Charles M. Thomson, stating therein that the city could not compel the railroads to electrify, but could prohibit the use of steam as a motive power when it is shown to be a public nuisance, the opinion being written by Assistant Corporation Counsel Albert W. May.

On October 19, 1910, an opinion was given by Corporation Counsel Brundage to Alderman Long, written by Assistant Corporation Counsel Charles M. Haft, holding that the City of Chicago is clothed with the authority to pass an ordinance requiring steam railroads to propel their trains by power other than steam, but the opinion is qualified by the recommendation that any ordinance which might be drafted "should neither specify the use of electricity nor unqualifiedly prohibit the use of steam, but that it should leave the companies free to employ steam in propelling their trains if in so doing they do not produce either smoke or noxious gases in a manner or to an extent that injuriously affects the public health, safety, comfort or convenience."

A similar opinion was rendered on December 9, 1910, by Corporation Counsel Brundage to Alderman Fred A. Britten, this opinion also being written by Assistant Corporation Counsel Charles M. Haft.

On June 19, 1911, an opinion was rendered by Corporation Counsel Sexton to Alderman Reinberg, chairman of the committee on local transportation. This opinion is to be found in the printed volume of Opinions of the Corporation Counsel from April 1, 1911, to December 31, 1912, page 116. It was written by Assistant Corporation Counsel Charles M. Haft and Lee D. Mathias.

In this last mentioned opinion it was pointed out that in the old charter of the City of Chicago there was specific authority conferred upon said city, "to regulate and prohibit the use of locomotive engines within the city and required railroad cars to be propelled by other power than that of steam," etc. (Tuley's Ordinances, 1873, p. 403.)

In that opinion the corporation counsel also called attention to the case of *Chicago Dock and Canal Company v. Gar-*

city, 115 Ill. 155, which holds "that the city does not, by adopting the Cities and Villages Act, abrogate the powers conferred upon it by such special charter."

By reason of the number of opinions which have been written in the law department of the city upon this subject it seems unnecessary for us to again enlarge in detail upon the right of the City Council to pass an ordinance of the nature of the one in question prepared by this office for your committee. In the main we concur in the opinion of Corporation Counsel Sexton rendered on June 19, 1911, and hold that the City Council has a right to pass an ordinance making it unlawful for railroads to use a motive power that will cause smoke, steam or noxious gases to escape.

The requirements contained in the ordinance before your committee making it unlawful to operate trains to and from any terminal station hereafter to be built by any motive power that will cause smoke, steam or noxious gases to escape, and similarly the specific provisions prohibiting the operation of all suburban passenger trains in five years, all passenger trains in seven years, and all freight trains in ten years, except under similar restrictions, are necessarily of such a character that they will be subjected to the test of reasonableness. This is true, notwithstanding the fact that it may be urged that under the provision of the former charter, above quoted, express power is given to do the thing contemplated. Our Supreme Court, in the recent case of *People ex rel. Busching v. Ericsson*, 263 Ill. 368, reaffirmed this well recognized rule in the following language:

"Appellees contend that as the ordinance was passed under the express authority given by this section of the statute the courts will not inquire into the reasonableness of the provisions of the ordinance. This statute, in general terms, empowers the municipalities of the state to direct the location and regulate the use and construction of garages. It gives no detail as to the manner in which this direction and regulation shall be exercised. Under those circumstances, the city availing itself of this statute must be reasonable in the terms which it imposes by its ordinances. * * * The rule adopted in this state is, that where the ordinance is passed in pursuance of power

expressly conferred by the Legislature and the details of such municipal legislation are prescribed by the Legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof or it will be pronounced invalid."

People ex rel. Busching v. Ericsson, 263 Ill. 368, 373.

Under the circumstances, therefore, it becomes important to take into account the reasonableness of the proposed ordinance from the standpoint of the time within which the railroads will be compelled to make the changes required thereunder.

Yours respectfully,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Appropriations Restricting Powers of the Board of Local Improvements.

February 26, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your request for advice concerning the provisions in the annual appropriation bill restricting the authority of the Board of Local Improvements with reference to the expenditure of certain money was referred to the undersigned for consideration and reply.

You state that certain vouchers have been submitted to you for approval and payment chargeable to appropriations made for the board of local improvements, but that such vouchers fail to make any reference to the restriction which the City Council undertook to impose and that no evidence has been presented therewith showing approval by the City Council of the expenditure for which the voucher was drawn.

The restriction referred to appears under a number of items and the wording is substantially the same in each, such wording being as follows:

“No expenditures shall be made, nor liabilities incurred against this account unless same have been approved by the City Council.”

This clause appears in connection with the appropriations for expert services and commissioners' fees, for the employment of counsel to assist the law department, for services of architectural experts, and for services of building experts in the proceedings involving the widening and improving of North Michigan avenue.

The Michigan avenue improvement is a local improvement within the meaning of the statute which confers on the board of local improvements certain powers. Among these powers are included the right to employ attorneys, to appoint engineers, assistant attorneys, inspectors, etc., which are necessary to carry on the work. The provision of the statute referred to is Section 83, which reads as follows:

“The board of local improvements in cities of one hundred thousand (100,000) inhabitants and over, according to the last census as hereinbefore provided, may appoint an attorney for the board who shall have charge, under its direction and control, of all legal matters pertaining to the board of local improvements, the confirmation of special assessments and the collection of the same. It may also appoint an engineer for the board, and such assistant attorneys, engineers, clerks, inspectors, etc., etc., as may be necessary to carry into effect the purposes of this act.”

It will be seen from the above that the statute clearly provides that the board of local improvements shall have the power to name the attorneys, experts and others for whom the appropriations were made. The City Council cannot legally, through the medium of an appropriation bill, usurp these powers. The primary and only object of an appropriation bill is to set aside the fund for the specific purpose for which an appropriation is to be made. An attempt to attach such a limitation thereto is either entirely nugatory or will invalidate the appropriation.

There would be no difference in principle in case the City Council undertook to appropriate for a position which must be filled by appointment under the Civil Service Act and attached a limitation thereto to the effect that the appointee must be satisfactory to the City Council.

The only question that can arise, therefore, is not whether the attempted restriction is valid, but whether the City Council, by inserting such a provision, rendered the appropriation invalid.

We have considered this question fully and are of the opinion that the appropriation will stand and that the attempted restriction must be regarded as surplusage.

There are numerous authorities which hold that where an appropriation of money is made for two objects, one of which is lawful and the other not, the court will enjoin or relieve against the expenditure which is unlawful and uphold the expenditure for the object which is lawful.

Roberts v. New York, 5 Abb. Pr. R. 41.

The general trend of decisions along this line is to hold good an appropriation where the object is lawful and where the invalid portion can be separated from the rest.

The case of *State ex rel. Worrell v. Carr*, 129 Ind. 44, involved a somewhat similar question as the one under consideration. There an appropriation was made for the expenses of a bureau "including the salary of the chief." This was followed by a provision to the effect that a person named, who had been acting as the *de facto* officer, and no other should receive the salary. The court held that the latter provision was absolutely void, but that, stripped of the objectionable provision, the remainder was good, thereby authorizing the payment of the salary to the lawful officer.

This rule is to be applied in the present instance.

We are, therefore, of the opinion that vouchers properly drawn under authority of the Board of Local Improve-

ments for expenditures along the lines indicated can be safely honored by the comptroller and treasurer.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Application of American Taxi Co. for Garage License.

March 2, 1917.

HON. J. C. McDONNELL, Chief Bureau of Fire Prevention and
Public Safety.

Dear Sir:

In regard to the application of the American Auto & Taxi Company for a building permit and license to conduct a garage in the building located at 1126 and 1128 South Wabash avenue, we beg to advise you that we have examined the ordinances with reference to fire prevention and public safety pertaining to garages.

Section 144 of Article X of the ordinance passed July 22, 1912, provides that the term garage shall be construed to mean a building or that portion of a building wherein are housed, for rent, care, demonstration, storage or sale, one or more self-propelled vehicles or other wheeled machines containing in the tanks thereof volatile inflammable liquid for fuel or power; also all parts of buildings in all adjoining structures or buildings not separated from the garage proper by walls or brick or concrete extending at least three feet through the roof and having openings, if any, protected on both sides of walls by automatic fire doors constantly closed except when necessarily temporarily opened for passage. This section of the ordinance also provides that a garage housing not more than four such vehicles shall be termed a private garage, and a garage housing five or more such vehicles shall be termed a public garage.

Section 145 of the ordinance creating a Bureau of Fire

Prevention and Public Safety was amended on June 19, 1916, and, as amended, provides that every building more than one story and less than four stories in height hereafter constructed for a public garage or hereafter converted to the use of a public garage shall be of fireproof construction throughout or shall be equipped throughout with an approved system of automatic sprinklers, and any such buildings more than three stories in height shall be of fireproof construction throughout and shall be equipped throughout with an approved system of automatic sprinklers. The ordinance also provides that in all such buildings more than one story in height all window openings shall be fitted with approved metal frames and sashes and glazed with wired glass, and all floor openings shall be enclosed in walls of masonry consisting of not less than eight inches of brick or reinforced concrete or 12 inches of tile; all openings in such walls shall have approved automatic fire doors.

Affidavits made by officials of the Studebaker Bros. Manufacturing Company and the Studebaker Corporation of America have been filed with us containing statements that the said firms occupied the building at 1126 and 1128 South Wabash avenue for the storage of automobiles in excess of the number of 100, and that said cars were driven in and out of said building under their own power and contained in the tanks thereof gasoline for said purpose, and that the building in question was used by the said firms for this purpose during the years of 1910, 1911, 1913 and 1914, and from an examination of all the correspondence forwarded to us we find and beg to advise you that the building at 1126 and 1128 South Wabash avenue has been used and operated as a garage prior and subsequent to the passage of the ordinance of July 22, 1912, and that on October 3, 1916, your department addressed a communication to the applicant notifying them that before you could approve their application for a license for a garage in this building it would be necessary for them to comply with the provisions of the ordinances, and in said communication you indicated eleven changes that they would have to make in order to secure your approval.

We have carefully examined your communication to them and believe that you are acting clearly within the provisions of the ordinance in requesting that the improvements you suggest be made. As the building in question has been used as a garage for a number of years, it is not a building erected or converted into a garage since the passage of the ordinance and must, therefore, be considered a garage, and its use as such may be permitted to continue after the party so desiring to use it shall comply with the requirements of your department as indicated in your communication to them dated October 3, 1916.

The applicant has presented to us a contract dated December 26, 1916, and it claims to have awarded the contract for the making of all improvements requested by your department. If, upon the examination by you of this contract, its contention is correct, we would respectfully recommend that you approve his blue-prints, plans and specifications for this work and recommend the issuance of a license and building permit.

Yours very truly,
JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Distribution of Money as Prizes for Suggesting Trade Name for Goods.

March 6, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.
Dear Sir:

We are in receipt of your communication of recent date to which you attach a letter from The Brunswick Keith Co., outlining a plan for distributing prizes for the suggestion of trade names for brands of their goods. You ask whether there would be any violation of law in case this company pursued their plan of selling goods.

It is proposed to allow each of the customers of this concern to submit for competition each week or month a trade

name which he considers appropriate for a certain brand of goods that the company is advertising and selling. These suggestions are to be submitted to three judges to be selected by the company, who will determine the most appropriate name among those submitted and award as a prize for the suggestion five per cent of the total cash received by the company through the sale of the clothes made by it for the week during which the suggestions are sent in.

Perhaps there is nothing in the plan proposed which in itself is contrary to law, if honest methods are adhered to. However, it may be subject to great abuse which we cannot at present answer for. Thus, in case the selection of a name is made by lot the plan would be a lottery scheme; in case the judges selected a name proposed by a person in league with the officers or agents of the company or having an understanding with them by which he is to be favored, it would amount to a fraud; the advertising might be of such a nature that the postal authorities would object; and other irregular ways of carrying on the competition could be pointed out.

While we have no right to assume that these parties contemplate anything but an honest competition, we do not deem it proper to advise you to put the seal of approval in advance on schemes of this kind. Any legitimate plan of advertising or selling goods can be pursued without securing the assent of the police as a pre-requisite before embarking in the business.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Ordinance Authorizing Quit Claim Deeds Upon Payment of
Taxes Where City Holds Tax Deed.**

March 6, 1917.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

You forwarded to us, for our opinion on same, an ordi-

nance prepared by the city's real estate agent, and approved by the comptroller, designed to amend Section 35 of The Chicago Code of 1911 in such a way that quit claim deeds may be given for real estate on which the city holds tax deeds by reason of sales for general taxes in the same manner as it now makes such quit claim deeds in cases where it holds tax deeds by reason of sales for delinquent special assessments.

The comptroller states that the city has on hand a number of old tax deeds obtained through sales for general taxes held prior to 1875, and that requests are made for estimates from time to time as to the amount which the city will charge to make settlements of these old claims. He states further that it is desirable that a definite and uniform policy should be established.

We can see no objection to the proposed amendment to the code. The Legislature, through an act passed in 1909, has made it obligatory on the grantee of a tax deed who has not taken possession of premises claimed thereunder to reconvey such premises to the owner upon the payment of the amount of money expended by the tax title holder at the sale with five per cent interest per annum, together with subsequent taxes and specials paid and statutory fees and costs incurred based on an estimate of the County Clerk. These fees and costs are fixed by statute. We have no doubt that the six per cent interest provided in the proposed amendment would bring the total to the amount which the city could claim under this statute. Hence, the passage of this ordinance would amount to authorizing the city's officers to make estimates practically in accord with the statute.

We have redrafted the ordinance, making a slight change therein, and forward same herewith. We also return the letter of the real estate agent, above referred to.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Designation of City Depositary After the Beginning of
Fiscal Year.**

March 6, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date concerning the ordinance passed January 19, 1917 (Council Journal, p. 2886), designating the Phillip State Bank as a city depositary, and in response thereto submit the following:

It appears that this bank submitted its bid last December, in response to the regular advertisement of the comptroller for bids for interest on moneys to be deposited in 1917; that the bank made no offer on average balances, but offered $1\frac{1}{2}$ per cent for moneys deposited and allowed to remain 30 days, $1\frac{3}{4}$ per cent on moneys allowed to remain 60 days, and $2\frac{1}{4}$ per cent on moneys allowed to remain 90 days; that this bid was considered, along with all other bids from national and state banks, by the City Council and its committee on finance, and that it was rejected. The bids of the banks which were accepted offered a higher rate of interest.

You state in your letter that the Phillip State Bank subsequently appealed to the Finance Committee and requested the acceptance of a revised bid, with the result that the ordinance above referred to was passed. This may be correct, but there is nothing in the ordinance itself which indicates that there was a revised bid. All that the ordinance attempts to do is to authorize the city comptroller to accept the bid of this bank—there is no mention of a revised bid or a higher rate of interest. Hence, if moneys were to be deposited in this bank there would be no obligation on its part to pay more than was stipulated in the original bid.

While it seems idle to speculate as to the legal effect of designating a new depositary so long after the others were named where the ordinance naming it would permit deposits at a lower rate of interest than is now received from the others, we deem it proper to say that it is at least doubtful whether the City Council has the right to accept even a higher

bid if one is tendered after the beginning of the fiscal year. That is to say, it would be doubtful whether the city's fiscal officers would be relieved of liability as provided by statute if such a course were pursued.

The statute seems to contemplate that awards on the bids shall be made before the beginning of the fiscal year, and the implication is that the awards shall be for the full year. It is true the City Council accepted the bids subject to a reservation for re-advertising, and it is probably also true that in construing the powers of the City Council in this respect the courts would have regard to the safety of the funds of the city and would give much latitude to the powers of the City Council. Nevertheless, we can see no reason for exercising powers which are doubtful and which would probably give rise to technical legal objections on the part of sureties in case they sustained a loss.

The statute in question reads as follows:

“§5. It shall be the duty of the comptroller at least once in each year and not later than the first day of December of each year, to advertise for bids from all regularly established national and state banks doing business within the city, for interest upon the money of the city so to be deposited in such banks. Such bids shall be reported to the City Council for its information and consideration not later than the fifteenth day of December of each year, to the end that an award or awards may be made upon such bids by the City Council prior to the end of each fiscal year. Such awards shall be made to the highest and best responsible bidder or bidders. The City Council shall have the power to reject all bids and to designate as many depositaries as it deems necessary for the protection of the city's interests, and award bids accordingly.”

We are of the opinion that the only course which can be pursued with absolute safety to the city—and more particularly to the officers of the city who have the handling of its funds—is to make the awards before the end of each fiscal year for the entire fiscal year which is to follow.

Since the action of the City Council in designating another depositary after the beginning of the fiscal year, even if legal and proper, imposes no obligation on you to make

deposits in such institution, we would not advise you to assume the responsibility of making deposits therein.

In your letter you ask whether the bank in question can be accepted after the time fixed in the statute above quoted, to which we have replied as above that we do not think it advisable from a legal standpoint to do so, although we avoid saying that it would be absolutely unlawful.

You also ask whether the designation of this bank subsequent to January first has any legal effect on the acceptance of the other city depositaries which were named prior to that date. To this we reply that it has no effect whatever.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contest for Seat of Municipal Judge.

March 8, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your communication of the 1st instant enclosing copy of notice served on you concerning the payment of salary to Arnold Heap, Associate Judge of the Municipal Court, and your request to be advised in the premises, is received. Said notice is as follows:

“Chicago, Ill., Feb. 28, 1917.

To the Hon. Eugene R. Pike,

Comptroller of the City of Chicago.

You are hereby notified that the undersigned, citizen and tax payer of the City of Chicago, hereby protests payment of further salary to Arnold Heap, as Associate Judge of the Municipal Court of Chicago, and in support of this protest respectfully refers to the decision of the Supreme Court of the State of Illinois, in case number 10961, *Wells v. Robertson et al—James Donahoe, Appellant v. Arnold Heap, Appellee*, rendered at the February term, A. D. 1917.

(Sgd.) Francis E. Croarkin.”

The case referred to in the said notice is an election contest, contesting the election of Arnold Heap as Judge of the Municipal Court of the City of Chicago. The court in this case reversed the judgment of the Superior Court and remanded the cause for further proceedings with directions to permit appellee, Arnold Heap, to plead any further or other defense he may have to the action.

Arnold Heap received his certificate of election and received his commission as Associate Judge of the Municipal Court of Chicago from Edward F. Dunne, Governor of Illinois, and was sworn in, and has since occupied, and is still exercising the functions of said office pursuant to said commission.

Under a similar state of facts, our courts have repeatedly refused relief by injunction to restrain the payment of salary to a *de facto* officer. The court in the case of *Lavin v. Commissioners of Cook County*, 245 Ill. 496, at page 505, said:

“This court, in *People v. Lieb, supra*, cited with approval *Brown v. Lunt*, 37 Me. 428, where a *de facto* officer is described as one who actually performs the duties of the office with apparent right, under claim of color of appointment or election; and also the case of *Ex parte Strang*, 21 Ohio St. 610, where it is said: ‘The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint, and that a statute, though it should be found repugnant to the constitution, will give color.’ The court further says in the *Lieb* case: ‘To constitute an officer *de facto* it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office,’ citing *Fowler v. Beebe*, 9 Mass. 232, and *Conover v. Fowler*, 10 *id.* 291.

“Under the undisputed facts appearing in this record Loesch was a *de facto* special state’s attorney under any definition that may be applied to him and as such entitled to compensation. If we are right in this conclusion and if Loesch was at least a *de facto* special state’s attorney, then the next inquiry is, has plaintiff in error, as a citizen and a tax-payer, any standing in a court of equity to enjoin him from the performance of the duties of his office or from receiving the emoluments thereof?

“The doctrine is well settled that a court of equity is not the proper forum to determine a contest between con-

flicting claims of title to an office. (High on Injunctions, Sec. 1312, and cases there cited.) In Section 1314 of High on Injunctions it is said: 'It may be affirmed as a general and well established rule that equity will not lend its interference in a contest between conflicting claimants to an office to enjoin the incumbent *de facto* from receiving the salary, fees or emoluments pertaining to such office, since such interference would, in effect, practically decide the disputed question of title involved, and would thus usurp to a court of equity, through its preventive remedy by injunction, a jurisdiction which can only be exercised in a legal forum.' The rule laid down by High, above quoted, has often been approved by this and other courts.

"The case of *Burgess v. Davis*, 138 Ill. 578, is an authority in this state directly in point and must be held controlling upon the point now under consideration. The *Burgess case* was a bill in chancery filed by a tax-payer on behalf of himself and all other tax-payers of Cook County, against the county clerk, county treasurer and Richard Prendergast, to enjoin the county officers from paying out of the county treasury any money to Judge Prendergast on account of salary due him as county judge. The ground upon which the tax-payer based his right to an injunction was, that Prendergast had accepted the office of trustee of the Sanitary District of Chicago, which was incompatible with his office as county judge, whereby, it was contended, he had resigned the office of judge of the county court and that said office had become vacant, and that Prendergast was not entitled to any salary as judge of the county court and that the same ought not to be paid to him out of the public funds of the county. In disposing of that case this court, on page 581, quoted from High on Injunctions, as follows: 'Courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law.' It was admitted by the bill that Prendergast was *de facto* county judge, and this court, on page 582, further said: 'A court of equity will not entertain jurisdiction for the purpose of enjoining a *de facto* incumbent of an office from performing its duties. Such result must be effected by judgment of ouster in a *quo warranto* proceeding. It follows that equity will not interfere to enjoin the payment of fees, salaries or emoluments to a *de facto* incum-

bent of an office. Public policy will prevent the courts from interfering to disturb a *de facto* officer in the receipt of the fees,' citing *Stone v. Wetmore*, 42 Ga. 601."

Until a judgment of ouster has been rendered from the court wherein the contest was held, you would not be justified in withholding salary. If the contestant is successful in his suit, he has an action against the *de facto* officer for the salary received while he was unlawfully kept out of office, but he has no action against the city for the money paid during the pendency of the contest.

Scott v. Crump, 106 Mich. 288;

Michel v. City of New Orleans, 32 La. 1094.

16 L. R. A. (N. S.) 794.

We would advise you, therefore, to continue the payment of salary to Arnold Heap, Associate Judge of the Municipal Court, until a judgment of ouster is issued in said contest.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consents for Sign Board.

March 9, 1917.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your communication of the 5th inst., relating to frontage consents for sign board located on Sheridan road northwest corner of Addison, northwest corner Sheridan road and Waveland avenue, and southwest corner Sheridan road and Grace street.

You wish to be advised as to just what consents are required on Sheridan road. The east side of Sheridan road between Addison street and Grace street is occupied by the Lincoln Park Commissioners and used for park purposes. The

lake immediately adjoins Sheridan road on the east for the full length from Addison street to Grace street.

The question presented by your query is whether or not the frontage on the east side of Sheridan road should be taken into account in computing the frontage consents required under Section 707 of The Chicago Code of 1911, which provides as follows:

“It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located. Such written consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such billboard or signboard.”

It is evident from the portion of said section, to-wit: “It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent, in writing, of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located,” that frontage on both sides of Sheridan road will have to be taken into account in computing the majority required.

That park property owned by park boards and abutting on streets must be taken into consideration in computing the frontage required under frontage consent ordinances, such as the one in question, has been settled in favor of the park boards in the case of *Theurer v. People*, 211 Ill. 296.

The question as to the boundary within which such frontage consents are required was defined in the case of *Wise v. City of Chicago*, 183 Ill. App. 215. Under the ruling in this

case, the applicant for the permit for the billboard on the northwest corner of Addison street and Sheridan road will have to obtain the majority of frontage on both sides of Sheridan road between Addison street and Waveland avenue; for a billboard to be erected on the northwest corner of Sheridan road and Waveland avenue, he will have to obtain the frontage consents of the property owners on both sides of Sheridan road between Waveland avenue and Grace street, and for a billboard to be erected on the southwest corner of Grace street and Sheridan road he will have to obtain the majority of the frontage on both sides of Sheridan road between Grace street and Waveland avenue, if the three blocks in question come within the terms of Section 707 of The Chicago Code of 1911, that is to say, if one-half of the buildings on both sides of the street are used exclusively for residence purposes, in each of the blocks now in question.

Very truly yours,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Power of Board of Education to Sign Frontage Consent Petitions.

March 9, 1917.

HON. GEORGE PRETZEL, Chairman Committee on Buildings
and City Hall.

Dear Sir:

We are in receipt of a communication from your committee requesting an opinion as to the power of the Board of Education to sign frontage consent petitions for property owned by the Board of Education for the erection of any building, or the maintenance of any business therein, in the City of Chicago, for the issuance of a permit for the erection or maintenance of which the city ordinances require as a condition precedent the filing of majority frontage consents.

The Board of Education of the City of Chicago was created by an act of the Legislature of the State of Illinois, which act appears in Hurd's Revised Statutes of Illinois, 1915-1916, as Sections 128 to 139, Chapter 122.

Section 132 of said Chapter 122 provides:

"The Board of Education shall have charge and control of the public schools in such cities, and shall have power with the concurrence of the City Council:

"First: To erect or purchase buildings suitable for school houses, and keep the same in repair.

"Second: To buy or lease sites for school houses with the necessary grounds. If the board of education shall be unable to agree with the owner or owners for the purchase of such site, then, with the concurrence of the city council, it may acquire the title to such site in the manner provided by law for the exercise of the right of eminent domain. Such proceedings to condemn shall be in the name of the city in trust for the use of schools.

"Third: To issue bonds for the purpose of building, furnishing and repairing school houses, for purchasing school sites, and to provide for the payment of such bonds; and to borrow money for school purposes upon the credit of the city."

Section 133 provides:

"The said board of education shall have power:

"First: To furnish schools with the necessary fixtures, furniture and apparatus.

"Second: To maintain, support and establish schools and supply from taxes the inadequacy of the school funds for the salaries of teachers.

"Third: To hire buildings or rooms for the use of the board or of schools.

"Fourth: To employ teachers and fix the amount of their compensation.

"Fifth: To prescribe the school books to be used, and the studies in the different schools.

"Sixth: To divide the city into school districts, and to alter them and create new ones as circumstances may require, and generally to have and possess all the rights, powers and authority required for the proper management of schools, with power to enact such ordinances as may be deemed necessary and expedient for such purposes.

“Seventh: To expel any pupil guilty of gross disobedience or misconduct.

“Eighth: To dismiss and remove any teacher for cause in the manner provided in Section 161 of this act.

“Ninth: To apportion the pupils to the several schools.

“Tenth: To lease school property and to lend moneys belonging to the school fund.

“Eleventh: To grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts and other educational and social interests, free of cost, but under such provisions and control as they may see fit to impose.”

Section 134 provides:

“It shall be the duty of the board of education:

“First: To superintend and control the schools in such cities.

“Second: To examine all persons offering themselves as candidates for teachers, and when found well qualified to give them certificates gratuitously.

“Third: To visit all the public schools as often as once a month.

“Fourth: To establish such by-laws, rules and regulations for the establishment, maintenance and government of a proper and uniform system of discipline in the several schools as may in their opinion be necessary.

“Fifth: To determine from time to time how many and what class of teachers may be employed in each of the public schools, and to employ such teachers and fix their compensation.

“Sixth: To take charge of the school houses, furniture, grounds and other property belonging to the school districts, and see that they are kept in good condition and not suffered to be unnecessarily injured or deteriorated.

“Seventh: To provide fuel and such other necessities for the schools as, in their opinion, may be required in the school houses, or other property belonging to the said districts.

“Eighth: To establish and maintain vacation schools and playgrounds under such rules and regulations as it shall prescribe.

“Ninth: To inquire into the progress of pupils and the government of the schools.

“Tenth: To prescribe the method and course of discipline and instruction in the respective schools, and to see that they are maintained and pursued in the proper manner.

“Eleventh: To prescribe what studies shall be taught, and what books and apparatus shall be used.

“Twelfth: To report to the City Council, from time to time, any suggestions they may deem expedient or requisite in relation to the schools and the school fund, or the management thereof, and generally to recommend the establishment of new schools and districts.

“Thirteenth: To prepare and publish an annual report, which shall include the receipts and expenditures of each school, specifying the source of such receipts and the object of such expenditures.

“Fourteenth: To communicate to the City Council, from time to time, such information as may be required.”

Section 136 provides:

“All conveyances of real estate shall be made to the city and the title of all property acquired by condemnation shall be vested in the city, in trust for the use of schools, and no sale of real estate or interest therein used for school purposes or held in trust for schools shall (be) made, except by the City Council upon the written request of the Board of Education.”

Section 139 provides:

“All schools in such cities shall be governed as herein provided and no power given to the Board of Education shall be exercised by the City Council of such cities:

The foregoing sections contain all of the powers granted to the Board of Education and the City Council in regard to the public school property. The title to all school lands in the City of Chicago is held by the city in trust for the use of schools, but under Section 136 no sale of real estate or interest therein used for school purposes or held in trust for schools shall be made, except by the City Council *upon the written request of the Board of Education*.

There is no judicial decision directly in point concerning the authority to sign frontage consents for school property, but the case of *Theurer v. People*, 211 Ill. 296, is analogous. The court in the case just referred to had under consideration

the question of the right of the South Park Commissioners to sign frontage consents for the conduct of a dramshop on a street adjoining one of the parks under the control of the South Park Commissioners. The court in passing on said question, at page 298, said:

“We do not, however, think the contention correct that the park commissioners have no legal power to sign for the park frontage. The legal title to all park lands is in the commissioners. In *People v. Salomon*, 51 Ill. 37, it was said (p. 52): ‘It is argued that this park property belongs to these commissioners as a corporation. This is so by the terms of the act. They hold the fee, but the usufruct is in the public; but holding it, they hold it as a public corporation for public purposes.’ The park board was created by an act of the Legislature approved February 24, 1869, as amended April 26, 1869, by which it is provided that all lands acquired by said commissioners shall be held, managed and controlled by them and their successors as a public park, for the recreation, health and benefit of the public, free to all persons forever; and it is also provided they shall have full and exclusive power to govern and manage said park, to lay out and regulate the same, to pass ordinances for the regulation and government thereof, and that said commissioners shall possess all the power and authority over said park now by law conferred upon the City Council of the City of Chicago in respect to public squares and places in said city. The powers thus conferred upon said commissioners over the real estate of the park, it will be observed, are very broad. It is the duty of the commissioners to improve and beautify said lands and to make the park a safe and pleasant place for the resort of the entire community, and it is not unreasonable to hold that they are interested in protecting the park and the public who resort thereto from surroundings which may be unwholesome, obnoxious or dangerous.”

In perusing Sections 133 and 134, hereinbefore quoted, it will be observed that the powers granted to the Board of Education with respect to the management and control of school property are very broad and are similar to those of the South Park Commissioners passed upon in the Theurer case, except that the fee of the park property is vested in the park commissioners, while the fee of the property under the

jurisdiction of the Board of Education is held by the City of Chicago.

The control of the City Council over the property comprising the Chicago public school system appears to be specifically limited to the requirement, as provided in said Section 132, that the Board of Education, as a condition precedent, must obtain the concurrence of the City Council in endeavoring to perform the acts contemplated by said section, whereas the Board of Education among its divers powers, is charged with the sole responsibility of seeing that the school grounds and school houses are not suffered to be unnecessarily injured or deteriorated.

The Board of Education, through the medium of its constant supervision over school property and the conduct of the public schools, should be more conversant with the question as to whether or not the building of certain structures, and the maintenance thereof for the conduct of a designated business in close proximity to a school, would be detrimental to the welfare of the pupils or tend to damage school property; and we believe it is reasonable to assume that the Legislature, in passing the school act, had this idea in mind and that it intended to vest the management and control of the school property, together with such incidental powers as might be essential to the exercise thereof, in the Board of Education, subject only to the limitations of Section 132 of the School Act.

The title to all school property granted by the government was vested in the State of Illinois, and the Legislature has, by its acts, vested the title in local authorities. The Legislature by the act establishing the Board of Education, has vested the naked title to school property in the City of Chicago, as a trustee for the Board of Education, and has granted the general supervision over all the property to the Board of Education. The city has no independent power in regard to this realty of the Board of Education, and can only act regarding it at the request of the Board of Education.

It is our opinion, therefore, that the power to sign frontage consents under the frontage consent ordinances of

the City of Chicago, in connection with property under the supervision of the Board of Education, is vested in the Board of Education.

Very truly yours,
 GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Ordinance Establishing a Bureau of Employment.

March 20, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We are in receipt of your request for an opinion as to the validity of Section 3 of an ordinance passed on March 23, 1914 (pages 4588-4589 of the Council Journal of that date), establishing a department of public welfare.

Section 3 of said ordinance is as follows:

“There is hereby created a bureau of the department of public welfare, which shall be known as the bureau of employment and which shall operate the Municipal Lodging House for Men and the Municipal Lodging House for Women, and which shall perform such duties in the collection of information relative to working conditions, wages, hours of labor and unemployment in the City of Chicago, and in the practical relief of unemployment, as may be required by the said commissioner of public welfare. The chief officer of said bureau of employment shall be known as the superintendent of the bureau of employment.”

From a reading of the above section it is quite clear to us that the object of such section was to provide for a bureau for the purpose of securing employment for such unemployed as might make application for positions.

A careful examination of Article V, of Chapter 24, of Hurd's Revised Statutes, in which article the power of legis-

lation is conferred by the General Assembly upon the City Council, fails to disclose where any power exists in the City Council to create a bureau of this character and to use the corporate funds of the City of Chicago in the payment of the expenses for the operation of such a bureau.

The City Council possesses only such power to legislate as the General Assembly has conferred upon it, and where power has not been conferred upon the City Council to legislate upon any matter it has no power to do so.

Our Supreme Court has repeatedly held that the police power of the City Council is limited in its scope to such matters and things as the Council possesses power to legislate upon.

The Act of May 11, 1903, amended June 24, 1915, in force July 1, 1915 (Hurd's Revised Statutes, Chapter 48), creates one employment office in each city of not less than 50,000 population in the state, and one in two or more contiguous cities or towns having an aggregate or combined population of not less than 50,000, and in each city containing a population of 1,000,000 or over, one central office with as many departments as would be practicable to handle the various classes of labor, such branch offices not to exceed three at any one time. The location of the branch offices, for the purpose of receiving applications of persons seeking employment, and applications of persons seeking to employ labor, is to be approved by the governor, and such offices are known and designated by the act as "Illinois Free Employment Offices."

Nowhere in this act is any power conferred upon the city council of any city, or the board of trustees of any town, to create employment offices or bureaus. In fact, it is quite apparent that the state has seen fit to reserve this power to the General Assembly, and the provision of the said act for the advisory board to consult and co-operate with similar bureaus and commissions of other states and with the Federal employment office in the Department of Labor, and with such municipal bureaus and exchanges as are now in operation or may hereafter be created, does not even by impli-

cation authorize the creation of free employment bureaus by cities, towns or villages within this State.

We, therefore, beg to advise you that Section 3 of the ordinance passed March 23, 1914, purporting to create a bureau of employment in the Department of Public Welfare is invalid and void, and the head of this department should discontinue the expenditure of money of the city for any such purpose.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Outstanding Tax Warrants of 1915.

March 27, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you state that there are now outstanding tax warrants issued in anticipation of the taxes of 1915 amounting to one million, one hundred and fifty thousand dollars; that the county treasurer reports that he is withholding a large sum from the general taxes for the year 1915 on account of litigation now pending concerning the validity of the levy of that year; and that you deem it inadvisable to await the collection and return by the county treasurer of the remaining taxes for the year 1915 before redeeming the outstanding 1915 tax warrants.

You further state that you desire an opinion as to the legality of the payment of these outstanding tax warrants out of any money at present in the corporate fund derived either from general taxes, miscellaneous receipts or the sale of tax warrants, and whether council authority is necessary before such payment is made.

The statute provides that whenever there is not sufficient money in the treasury to meet and defray the ordinary and

necessary expenses of the city it shall be lawful for the proper authorities to provide a fund to meet such expenses by issuing and disposing of warrants "drawn against and in anticipation of any taxes already levied" for the payment of such expenses to the extent of 75 per cent of the total amount of the levy. It provides further that warrants drawn and issued under the provisions of the statute shall show upon their face that they are payable solely "from said taxes when collected and not otherwise."

The plain purpose and intent of this statute is manifest. It is designed to provide a way for raising money for current expenses out of revenues to be derived from taxes already levied and it cannot be construed to authorize the issuance of warrants drawn on taxes to be subsequently levied. In other words, the officers of the municipality are without power to pledge the credit of the city to be paid in the future out of revenues to be derived from taxes levied in subsequent years.

Sullivan v. Commissioners of Highways, 114 Ill. 262.

On the other hand, while the law does not contemplate that the taxing power of the future shall be hypothecated in order that money may be realized for the present, we are satisfied that it will never be construed to mean that a person who had advanced money on tax anticipation warrants shall be deprived of same by reason of some unexpected shortage, such as the loss of revenue on account of a mistake of the officers of the city, or the failure of an officer to make proper return and payment, or any similar contingency.

The same is true with regard to moneys advanced from funds which the city uses for the purpose of purchasing these warrants from time to time. The money will have to be paid sooner or later and will become a charge on the city's resources until fully paid. Any other construction of the law would pave the way for manipulation of accounts so that moneys could be withdrawn from special funds and used for general corporate purposes.

The situation that has arisen in the present instance is purely accidental. It is due to the fact that certain other taxing bodies (not the city) have levied taxes in such a way

that the Supreme Court has pronounced the levies unlawful. The funds of the city are being withheld, not on account of the fault of the city, but because the county treasurer deems it unwise to make a distribution of moneys in his possession collected from taxpayers until all these vexed questions have been finally decided. Under these peculiar conditions we see no reason why the warrants of 1915, which, in the ordinary course of events, would have been paid long before this, should not be paid out of anticipation warrants issued against the 1917 taxes. If these warrants were in the hands of private parties and were drawing interest at the rate of 4 per cent per annum, good financiering would require that they should be redeemed so as to avoid excessive interest; and in the handling of the city's special funds it requires that such redemption should be made even though the interest charged is not excessive.

We are, therefore, of the opinion that it would be entirely proper to redeem these warrants from funds derived from the tax levies of either 1914 or 1917 as may be deemed proper. Such redemption can be made from moneys derived from general taxes or from warrants drawn in anticipation of general taxes, but not from moneys in the general corporate fund derived from miscellaneous receipts.

While it may appear that it amounts to the same thing whether taken from general taxes or from miscellaneous receipts, we still believe that a proper regard for the statute requires the observance of the provision that the warrants are payable solely from the general taxes when collected and not otherwise. The redemption of these warrants may well be regarded in the light of an ordinary and necessary expense which must be paid, and therefore new warrants may be issued in order to retire them.

We are of the opinion, after due consideration of all the circumstances, that it would be advisable to seek council authority for this purpose. We have therefore drafted an ordi-

nance which we submit herewith designed to meet the requirements.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Application of E. Popper Iron Company.

March 29, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your favor of March 22d, requesting an opinion as to the validity of the claim of E. Popper for a refund of a fee paid by him in 1915 for a junk dealer's license.

Popper bases his claim for this refund on his representations that he is and was, at the time the fee was paid, engaged in the wholesale junk business, that licenses were required only from those who carried on a retail junk business, that the license fee in question was paid to the city by his son, while he, Popper, was absent from the city, for the purpose of stopping the city officials from annoying him over the question of a license, and that the payment of \$50 was made to the city with the understanding that if this license was illegal the city would refund him the money.

During the year 1915 wholesale junk dealers were not required to take out licenses, and it was during that year that the license was issued to the above applicant.

It is the well settled law of this state that a person is not entitled to a refund of money voluntarily paid to the city as a license fee. The courts have held that money paid as a license fee under duress may be recovered back. Judge Dillon has stated the rule as to what degree of compulsion is required to make a payment of a license fee involuntary on the part of a person paying it, as follows:

“The coercion or duress which will render a payment of taxes involuntary must, in general, consist of some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment over the person or property of another from which the latter has no other or reasonable means of immediate relief except by making payment.”

2d Dillon on Mun. Corp., 4th Ed., Sec. 943.

From an examination of all the correspondence forwarded with this claim to this office, we are unable to determine what amount of compulsion, if any, was exercised on the part of the city officials in 1915, when this payment was made.

From the correspondence forwarded to us it appears that he was arrested in 1916 for not having a license, and was discharged. His arrest in 1916 cannot be used by him as an excuse for a refund of a license fee paid by him to the city in the year 1915.

If the applicant can present evidence sufficient to convince your committee that when he paid the \$50 license fee on October 15, 1915, he did so under protest and for the purpose of escaping arrest, your committee may be justified in recommending a refund. Unless the said applicant presents such evidence to your committee he is not entitled to a refund of the \$50 that he paid the city in 1915.

We return herewith your enclosures.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Extension of Street Railway Lines.

April 4, 1917.

HON. HENRY D. CAPITAIN, Chairman, Committee on Local Transportation.

Dear Sir:

Referring to your letter of the 17th inst., in which you

inquire as to what steps may be taken to facilitate the extension of the Calumet and South Chicago Railroad Company on 111th street, from Stewart avenue to Vincennes avenue, in accordance with the ordinance passed by the City Council on July 10, 1916 (C. P., p. 1398), this extension having been obstructed by the failure of the company to reach an agreement with the Chicago, Rock Island & Pacific Railroad Company in reference to the crossing of the latter's right of way, we beg to say that we are of the opinion that the Calumet and South Chicago Railroad Company has the legal right, subject, possibly, to the approval of the State Public Utilities Commission, to cross the tracks of the railroad company at the point in question even though an agreement cannot be reached with the latter company in reference to the terms upon which the crossing shall be maintained and operated.

It has been held by the Supreme Court of Illinois that, since a street railway is regarded as merely subjecting a street to a modified form of public use, rather than as an additional burden upon the street, the extension of such a line across the right of way of a railroad company, where authority to make such extension has been received from the municipal authorities, will not be prevented by injunction, and the railroad company is not entitled to damages on account of such crossing unless the work results in damage to its tracks or other physical property.

C. B. & Q. R. R. Co. v. West Chicago Street R. R. Co., 156 Ill. 255.

The State Public Utilities Act of 1913, however, provides that the consent of the State Public Utilities Commission shall be obtained before a crossing of this character is constructed, and that the commission shall have power to prescribe the manner in which the crossing is effected and the terms upon which it shall be maintained and operated.

The city has taken the position that the State Public Utilities Act does not apply to the street railway situation in Chicago, and in this position the street railways have joined. We understand, however, that it has been customary for the

latter, whenever they have entered into agreements with railroads in reference to crossings, to submit such agreements, as a matter of precaution, to the commission for approval. We believe that it is desirable to make an effort to bring about an agreement between the companies, in order to avoid, if possible, the presentation of a contested case to the commission for determination and to facilitate a settlement of the terms upon which the crossing shall be constructed and operated. If, however, an agreement cannot be reached, we believe that application may be made to the commission by the street railway for a hearing on the disputed questions without prejudice to the rights of the city or the street railways in litigation now pending or hereafter instituted, involving the jurisdiction of the commission in reference to the street railways of Chicago. In connection with this matter, it should also be borne in mind that the City Council has the power, in its discretion, to require the Chicago, Rock Island & Pacific Railroad Company to elevate its tracks as far south as the point in question. Under an ordinance passed by the City Council on July 13, 1908, that company is already required to elevate its tracks as far as 90th street.

In the case of the proposed extension of the tracks of the Chicago City Railway Company on State street, which is blocked by the failure of the Chicago, Rock Island and Pacific Railroad Company up to this time to elevate their tracks at 90th street, as required by an ordinance passed by the City Council on July 13, 1908, we enclose herewith a copy of a report handed to us by Mr. S. J. Fisher, chief street inspector. Mr. Fisher states that the work of elevating the tracks of the railroad company at 90th street will be begun some time in April.

The only legal remedy, which is provided by the ordinance under which the Rock Island is elevating its tracks, in case the company fails to carry on the work which it is required to do, is as follows:

“Each and every one of the companies required by this ordinance to elevate its tracks shall do its portion of the work in accordance with the terms hereof in apt and proper time so as not to interfere with the proper

and orderly prosecution of such work as a whole. Should any company fail or neglect so to prosecute its work, the commissioner of public works of the City of Chicago shall have, and is hereby given the right, power and authority to give ten days notice in writing, to such delinquent company to prosecute its work. If such company shall fail or neglect to comply with said notice, the commissioner of public works may take charge of and cause such work to be done and the expense thereof shall thereupon be paid by such delinquent company."

The city would, however, have the additional legal right, in case of the company's failure or refusal to proceed with the work in accordance with the terms and provisions of the ordinance, to compel the company to do the work in question by *mandamus*.

Very truly yours,
RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Proposed Addition to Blackstone Hotel.

March 31, 1917.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your communication of recent date in which you enclosed the application of The Blackstone Company for a permit to erect an addition to the Blackstone Hotel of the same height and general character and appearance as the present hotel. You also enclosed sketches and a letter from The Blackstone Company stating its position in the premises.

The gist of this matter is that The Blackstone Company desires to erect a building as a part of its hotel to the west of and connected with the Blackstone Theater of a height approximately 260 feet. This new building is to form part of the present structures through the means of an underground

tunnel and an overhead passageway two stories or more in height, and the purpose is to make it conform to the present structures so that the whole will be uniform or at least harmonious in architectural design and will be operated as a unit. The question is whether this plan conflicts with Section 598 (c) of The Chicago Code of 1911 (which prohibits the erection of new buildings over 200 feet in height) so as to prevent the issuance of the permit applied for.

The city's Law Department passed on the main question presented here when an opinion was rendered under date of July 17, 1914, holding that the ordinances of the city permitted an addition to the Borland Building of the same height as the existing structure, which was more than 200 feet in height. (Printed Opinions of Corporation Counsel from January 1, 1913, to October 5, 1914, p. 1026.) The law department then held that "The provisions of Section 598 (c) relating to the height of a building do not apply to the enlargement of an existing building in cases where its enforcement and the enforcement of Section 514 (c) would compel the reduction of the height of the portion of same already erected." Under this opinion permits for the erection of the addition to the Borland Building, the Boston Store, and perhaps other buildings, were issued, although these additions would have been beyond the height limit in the case of new structures.

We find no reason for departing from the decision reached at that time. Therefore the only question, if any, that can arise in the present instance is whether the structures as proposed are to be regarded as separate buildings under the ordinances.

There would be some basis for contending that the proposed completed structure consists of three separate buildings if the present bridge or gallery connection between the theater building and the hotel were to remain the same and only a similar connection were to be made with the new building. But the sketches submitted show that it is the intention to extend the art hall in the present hotel right through the theater building and making a complete story of

the present gallery, thereby in effect running a tunnel and two floors of the hotel building right through without a break into the new addition.

It is also shown that the ground was secured long before the passage of the present ordinance limiting the height of buildings, and plans projected at that time, with the object in view of operating the entire property as a unit for hotel and theater purposes.

Under these circumstances we do not feel justified in holding that the proposed addition when completed is to be regarded as a separate building. The mere fact that the central portion of the whole improvement (the portion occupied by the theater will be lower than the two portions on either side, does not overcome the presumption that the whole will constitute one building under the conditions that will then exist.

We are therefore constrained to hold that the permit should issue if all other requirements have been complied with, including the requirements of the ordinance of July 18, 1910, authorizing the construction across the alley. (Council Journal, p. 1341.)

We return the papers mentioned above which were submitted with your letter.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Permit for Construction of Textile Factory.

April 12, 1917.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Supplementing our communication of recent date, in reply to your request for an opinion as to whether or not you should issue a building permit to Oscar Heineman Company

for the construction of a textile factory on the east side of Fairfield avenue, immediately south of the alley in the rear of the premises at the southeast corner of Armitage and Fairfield avenues, without requiring them to file frontage consents in accordance with the amendment to Section 712 of Article XXIV of Chapter 16 of The Chicago Code of 1911, passed March 12, 1917, we beg to advise you that prior to March 12, 1917, the ordinances of the city did not require frontage consents as a condition precedent to the issuance of a building permit to erect a textile factory or manufactory in a residence district, but on March 12th the ordinance was amended by adding the words "textile factory or manufactory." The amended ordinance further provides that it shall be in force and effect from and after its passage and due publication.

The application for the building permit which Oscar Heineman Company desire was filed in the office of the building commissioner on March 26, 1917, and, in order to pass upon the question as to whether or not it is entitled to a permit it is necessary for us to determine whether or not the amended ordinance passed on March 12, 1917, was in force and effect on March 26, 1917.

Paragraph 1336, Section 3 of Chapter XXIV, page 965, Jones & Addington's Annot. Stat. of Ill., provides as follows:

"All ordinances of cities and villages imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation, shall, within one month after they are passed, be published at least once in a newspaper published in a city or village, or, if no such newspaper is published therein, by posting copies of the same in three public places in the city or village; and no such ordinance shall take effect until ten days after it is so published. And all other ordinances, orders and resolutions shall take effect from and after their passage, unless otherwise provided therein."

The amended ordinance in question, as passed March 12, 1917, provided that it should be in force and effect from and after its passage and due publication; and, from an investigation, it appears to us that the ordinance was published in the noon edition of The Chicago Evening Post on March 21, 1917.

This ordinance was also printed in the Journal of the Proceedings of the City Council, which was received from the printer by the city clerk on March 18, 1917, for general distribution by him. Even if the publication of an ordinance in the Journal of Proceedings of the City Council were sufficient to comply with the terms of the statute providing for the publication of ordinances, still, the Journal of the Proceedings of the City Council for the meeting held March 12, 1917, was not received by the city clerk for general distribution by him until March 18, 1917.

Where the ordinance, in terms, states that it shall take effect after "due publication," ten days after such publication is required.

Opinion to John Siman, City Clerk, by Assistant Corporation Counsel Hornstein, under date of October 27, 1916.

But such publication is not sufficient; the publication must be made in a newspaper published in the city. (See opinion above referred to.)

This ordinance was first published in The Chicago Evening Post, March 21, 1917. Hence, under the opinion above referred to, a copy of which is attached hereto, the ordinance did not become effective until March 31, 1917.

The Oscar Heineman Company applied to the commissioner of buildings for their permit on March 26th, which was prior to the time when the ordinance now under consideration became effective, and as they were entitled to a permit under the law as it was at the time they made their application, we recommend that you issue your permit in accordance with such application.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Contract for Merchandise as Gambling Transaction.

April 17, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We are in receipt of your letter, dated March 28th, with enclosure of a communication from the law firm of Rosenthal, Kurz & Houlihan, relative to the Chicago Pre-Installment Association, in which you request an opinion as to whether or not the manner of conducting business as therein outlined is legal.

The Chicago Pre-Installment Association is composed of merchants who are engaged in the business of conducting china shops, which make it a practice to sell merchandise to their patrons upon the pre-installment plan. Each member of the association enters into a contract with patrons who desire to purchase merchandise, which reads as follows:

“CONTRACT.

“HUMBOLDT ART STUDIO

“Agrees to deliver to the undersigned any article or articles of merchandise in their store to the value of ten dollars, upon the payment of said ten dollars in pre-installments of twenty-five cents per week, for a period of forty weeks, which the undersigned agrees to pay.

“I hereby agree to return this contract upon the receipt of merchandise.”

The persons purchasing merchandise in this manner are divided into clubs or groups of fifty, and the individuals in each such group or club are numbered from one to fifty. Each week a number is determined upon by a committee of three persons appointed by the president of the association, and the person in each of the groups or clubs, which are organized by the members of the association, who has this number, is entitled to receive ten dollars worth of merchandise although it is only partially paid for by the weekly payments which such persons have up to that time made. The number in question was formerly obtained by a drawing, but

the method of determining such number has been changed and is announced by the association to be as follows:

“A list of all such purchasers, not by name but only by their club or group and individual numbers, is given each week to the executive committee of the Chicago Pre-Installment Association, together with the date each individual purchaser made the first weekly payment.

“The president of the association shall appoint a sub-committee of three members, who shall on Friday of each week, determine by careful computation, the purchaser in each group, or club who has paid the mean average number of installments consecutively, computing each group or club separately and then collectively, and the number of the purchaser so ascertained will be transmitted to each member of the association on Saturday morning of each week, as the purchaser in each group or club who will be entitled to select and receive the \$10 worth of merchandise purchased.

“In order to participate in the computation, each individual purchaser must be in good standing by not being in arrears in his weekly payments for more than four weeks.”

It is apparent that even under this method of determining a number each week which shall entitle the holder to the ten dollars worth of merchandise the element of chance is present, but it is said by representatives of the association that those receiving this merchandise merely receive it in advance and must continue to pay twenty-five cents a week for forty weeks. The contract above referred to by which a member of the association agrees to give the patron ten dollars worth of merchandise upon the payment of said ten dollars in pre-installments of twenty-five cents per week has been recently changed so as to provide that the patron agrees to pay said twenty-five cents per week.

If there were a valid contract of sale under which the buyer were obligated to pay to the dealer the sum of ten dollars for merchandise purchased it would be clear that the transfer of the merchandise before the end of forty weeks would not be objectionable. We are of the opinion, however, that the transaction does not impose upon the patron any obligation to continue payment of such installments any

longer than he wishes to keep them up. The patron does not agree to purchase any merchandise, and whatever merchandise he obtains is not specified until he makes his selection after he has paid ten dollars or has the lucky number. The mere agreement to pay twenty-five cents a week under these circumstances does not amount to a contract and cannot be enforced. The true nature of the contract is that when ten dollars is received by the merchant he will give to the patron ten dollars worth of merchandise and no obligation arises until such ten dollars is received.

The plan of the association noticeably fails, therefore, to require the patron to continue to pay twenty-five cents weekly after he has drawn a prize. If the plan is revised so as to plainly show that the patron must continue to pay twenty-five cents a week until ten dollars is paid, even if such payments continue after he has drawn a prize, a considerable objection will be removed.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Official Bonds.

April 17, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your inquiry with reference to the bonds originally presented by the various appointive officers of the city and now in force was referred to the undersigned for consideration and reply.

You ask whether such bonds need be rewritten and re-approved by the City Council in view of the fact that the statute and the ordinances provide for the appointment of such officers for terms of two years.

We see no reason why the bonds above mentioned should not continue in force just as they stand at the present time. Under the law as explicitly stated both in the statute and ordinances, all such appointive officers hold their respective offices until their successors are appointed and qualified.

It has not been deemed necessary in the past to appoint an officer to succeed himself where he has been duly appointed and qualified at the beginning of the mayor's term and the mayor has retained him in his position. Consequently, the officer holds over without reappointment. The bonds which such officers give continue in force until the successor of such officer is qualified.

The section of the ordinance which governs this is Section 1642. That was amended on July 22, 1912 (Council Journal, page 1621), so that it expressly stated that the bonds and the liabilities of the sureties thereunder shall continue in force upon the expiration of the terms of office of such officer until his successor is qualified. This section was later amended on June 1, 1915 (Council Journal, page 415), so that inadvertently this provision was omitted, but we are satisfied that such bonds continue in force by operation of law without the express provision above referred to which has been accidentally eliminated from the code. Hence, it is proper to continue in force the bonds of all officers whose terms under the law would expire, by the payment of the premium for the next year, and there will be no occasion for re-appointment of such officers at the present time unless the mayor sees fit to again hand in their names for approval.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Payment of Funds to House of Good Shepherd and Erring
Woman's Refuge.**

April 20, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication advising us that the House of Good Shepherd and the Erring Woman's Refuge have both made demands upon you for the payment of money due the said institutions under the terms of a resolution adopted by the Board of Directors of the House of Correction on September 23, 1903, establishing in connection with, and as a part of, said House of Correction a House of Shelter for the care of girls committed to the said House of Correction, one branch of said House of Shelter being established at the institution known as the House of Good Shepherd and the other at the institution known as the Erring Woman's Refuge.

A bill for an injunction to restrain the city from paying the House of Good Shepherd under this contract was recently filed in the Circuit Court of Cook County (case No. B 17725), and upon a hearing before Judge Windes on March 20, 1917, the bill was dismissed for want of equity, and on said March 20, 1917, an appeal to the Supreme Court of Illinois was granted to the complainant on condition that within thirty day from that date he file a bond in the sum of \$250 with security to be approved by the Clerk of the Circuit Court, and also that he file within thirty days from said date, viz., March 20, 1917, a certificate of evidence. The time for the filing of the bond and the certificate of evidence expired on April 19, 1917.

We have caused an examination of the record to be made, and desire to advise you that no bond or certificate of evidence was filed by the complainant as required by the order of court on March 20, 1917.

Both institutions have complied with the terms of the agreement adopted by the Board of Directors of the House of Correction, and the claims on file with you are for pay-

ments at the agreed rate of 30 cents per day for each girl for the board, lodging, clothing, education and maintenance of said girls in said institutions.

We respectfully advise you that you are warranted in making payments to both institutions in the same manner as you did prior to the filing of the bill for an injunction referred to herein.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Proposed Change of Contract.

April 25, 1917.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We return herewith the office copy of the contract, entered into on the 26th day of March, 1917, between W. F. Cummings and the City of Chicago, which contract you turned over to us requesting an opinion as to whether you could change the provisions contained on sheet marked "Division A" for laying 600 volt armored cable in parkway and the laying of 600 volt armored cable beneath sidewalk, over ten-foot length, so that you could substitute a 600 volt lead-covered cable with two coats of jute and tar. You informed us that by reason of the action of the Government, it is impossible to secure the armored cable for some time to come, and that the jute-covered cable will satisfy the general conditions and character of the work and will save the city considerable money; in other words, it will be a decrease in the expense.

We notice that in the contract the following provision is made (line 115):

"The right is reserved to the City of Chicago, through its commissioner of gas and electricity, to make

alterations in the plans or specifications for the work included herein,"

and then the following provision:

"Should it become proper or necessary, however, in the execution of the work, to make any alterations which will increase the expense, said commissioner of gas and electricity shall report to the City Council the nature of such alterations and his estimate of the amount by which the expense to the city should be thereby increased."

This condition refers merely to the increase of the expense and there is no limitation in the contract which refers to the decreasing of the expense but, as noted above, there is the express provision permitting the alteration.

In the specifications (page 1-A) occurs the following provisions:

"ALTERATIONS:

"The commissioner of gas and electricity reserves the right to make any changes in the specifications and plans, or in the order in which work shall be performed, which may be deemed necessary, either before or after beginning work of construction under this contract, without invalidating this contract, provided the general character of the work as a whole is not changed thereby. If such alteration increases the quantity of the work to be done, such increase shall be paid for at the unit price established under this contract for each class of work actually performed. If such alteration diminishes the quantity of the work to be done, it shall not constitute a claim for damages or for loss of profits on the work that may be dispensed with, and the City of Chicago shall not be required to pay for work or material omitted."

These specifications were submitted to the several bidders and are incorporated in the contracts.

By virtue thereof there was a presumption that the commissioner of gas and electricity might make some change or alterations in the work to be determined as the work progressed, and if the changes and alterations are of such a character as not to change the general character of the work as a whole, they are within the terms of the specifications and contract. However, the contractor might object to go

on with the contract and claim that these changes were not of such a character, and therefore, to avoid any question arising later, it would be advisable at this time to submit the proposed changes or alterations in the contract to the contractor.

If the contractor consents to the change and these bids do not increase the expense of the work, we are of the opinion that you are authorized as commissioner of gas and electricity to change from armored cable as provided in the original contract to a jute-covered cable without in any way violating the terms of the contract.

We are also returning the contract executed the 12th day of March, 1917, between the Contracting and Material Company and the City of Chicago, concerning which contract you have asked us as to whether you could change the provisions contained in Division "A" on page 2 referring to the construction of brick manholes and substituting cement manholes therefor. You have informed us, orally, that the cement manholes will be less expensive than the contract price for brick manholes.

The conditions in this contract are similar to the conditions in the contract with W. P. Cummings, and we are of the opinion that, as long as the proposed alterations do not increase the cost of the work nor change the general character of the same as a whole, you have the authority, as commissioner of gas and electricity, to make the proposed alterations; but we would suggest that you submit the proposed alteration to the contractor in order to avoid any question as to whether the proposed alteration changes the character of the work.

In regard to both contracts we would suggest that you secure from each of the contractors memorandum consenting to the proposed alterations and incorporating prices for the work proposed to be submitted in place of the work provided for in each contract, and these agreements should be

duly executed by the contractors and by yourself, representing the city.

Yours very truly,
MORTON S. CRESSY,
EDWARD H. WRIGHT,
Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Temporary Appointments in Civil Service Positions.

April 25, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of a communication from your department addressed to the Civil Service Commission under date of April 23, 1917, and received at this office on April 24, requesting the approval of the Commission to make temporary appointment, on April 20, 1917, and also on April 23, 1917, to the position, in each instance, of calker in the Bureau of Engineering, Water Pipe Extension.

We beg to call your attention to the provision of the Civil Service Act pertaining to temporary appointment, which reads as follows:

“To prevent the stoppage of public business, or to meet extraordinary exigencies, the head of any department or office may, with the approval of the Commission, make temporary appointment to remain in force not exceeding sixty days, and only until regular appointments under the provisions of this act can be made.”

We are advised that on March 1, 1917, the Civil Service Commission addressed a communication to the heads of departments and all appointing officers, directing their attention to the foregoing provisions, requesting compliance therewith, and prescribing the proper form to be used when the approval of the Commission to make temporary appointment is requested.

The language used in the foregoing provisions of said act is clear and specific, and will not permit of any ambiguity as to the meaning of the same. The "approval" of the Commission is what the law directs, and it is clearly apparent in construing the language used in accordance with the intent and purpose for which the act was passed, that the "approval" meant therein is an "approval" based upon a present knowledge of the requirements and necessity for making such temporary appointment, and not the ratification of an act previously executed; for, what would it avail if the appointing power were authorized to make temporary appointment which thereafter the Commission should refuse to ratify?

Therefore, in view of the fact that the approval of the Commission is requested in this instance concerning a temporary appointment made without the Commission being properly advised as to the necessity thereof at or prior to the time such appointment was made, thus affording the Commission an opportunity to grant or refuse such approval at the proper time, we are of the opinion that the request for approval herein mentioned is not in conformity with the provisions of the Civil Service Act, and for that reason we are obliged to refuse to approve the same.

We herewith enclose such request.

Respectfully yours,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Reception to Representative of Foreign Country.

April 27, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In the matter of the proposed visit of the representatives of the British and French Nations to the City of Chicago, we beg to advise you as follows:

As this will be an event of great gravity and dignity, and, perhaps, of international importance, it seems to be apparent that whatever action is taken should be taken by or pursuant to the authority of the entire representation of the city.

The statute provides:

“The City Council shall consist of the mayor and aldermen.”

If, in this matter, the mayor should take one position and the aldermen take another position, the resulting situation would obviously be unfortunate, to say the least. Therefore, it is clear to us that whatever action is taken should be authorized by the City Council which, as above pointed out, consists “of the mayor and aldermen.” Our view, as above set forth, is sustained by precedent.

Thus, on April 24, 1893 (Council Proceedings, page 49), the Council adopted a resolution welcoming the Duke of Veragua and others, and presenting to them the freedom of the city, and, among other things, resolved as follows:

“That a committee consisting of His Honor, the Mayor, his cabinet officers and five members of this Council, be appointed by the chair to receive and entertain the party as in the judgment of such committee the importance of the occasion demands.”

Again, on July 24, 1893 (Council Proceedings page 716), on the occasion of the visit of the Lord Mayor of Dublin and the officers of the Dublin City Council to the World’s Columbian Exposition, the City Council resolved:

“That the Mayor appoint a committee of nine members of this Council to arrange for their reception in a manner becoming the dignity of their position.”

Again, on September 18, 1893, the Council adopted a resolution as follows (Council Proceedings, pages 824 and 825):

“*Resolved*, That the City Council of the City of Chicago do and hereby does request the Mayor in the name of the city and of its citizens, to extend to the Hon. Grover Cleveland, President of the United States, a cordial and respectful invitation to visit the city, and

to aid by his presence in making 'Chicago Day' a gala day, commemorative of the marvelous growth of our city since its devastation in 1871."

Other precedents might be cited but it seems unnecessary to do so.

We think it will be conceded by all that the proposed visit by the representatives of the British and French Nations is of at least as great gravity, dignity and importance as the visits provided for in the precedents we have cited, and hence that whatever action is taken with respect to such visits should be taken by the City Council.

Yours very truly,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Rights of Lien Claimants for Work or Material on a Public Improvement.

April 27, 1917.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

Your communication addressed to the Corporation Counsel, enclosing a letter from J. C. Sheldon, with reference to certain moneys due B. J. Regnell under a contract for carpenter work done for the City of Chicago, and now held by you has been referred to me. In reply thereto, I beg to say you are justified in holding this money for the reason that Martin Connolly & Son filed a notice bearing date of November 16, 1916, for a lien amounting to \$39.25. Section 23, Paragraph 37, Chapter 82, Hurd's Revised Statutes of 1916, creates a right to a lien against a fund due, or to become due, for work done or material furnished for a public improvement, and reads as follows:

"LIEN AGAINST FUND DUE OR TO BECOME DUE; CONTRACTORS FOR PUBLIC IMPROVEMENTS, NOTICE; DUTY AND

LIABILITY OF OFFICER NOTIFIED. Any person who shall furnish material, apparatus, fixtures, machinery, or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement: Provided, such person shall, before payment or delivery thereof is made to such contractor, notify the officials of the State, county, township, city or municipality whose duty it is to pay such contractor of his claim by a written notice. It shall be the duty of such official so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid such contractor. Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice for the damages resulting from such violation which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid pro rata in proportion to the amount due under their respective contracts. (Constitutional: *West Chicago Park Comrs. v. Western Granite Co.*, 200 Ill. 527.)

Under the provisions of the above section you would be liable on your official bond to the party serving the notice, for damages resulting from a violation of your duty, which may be recovered in an action at law in any court of competent jurisdiction. I am, therefore, of the opinion that you are justified in holding the money due Mr. Regnell under the contract until the claim for lien has been adjudicated, either by agreement or judicial proceedings.

It may be unfortunate for Mr. Regnell to have this small amount of money tied up indefinitely, but in cases of this kind there is no section of the statute giving you the right to pay it out.

Very truly yours,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City for Costs of Suit for Enforcement of Ordinances.

April 27, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

In further response to your letter of April 6th, we beg to advise you that we have examined the records in the case of *City of Chicago v. J. J. Moser*, Municipal Court Gen. No. 652,788, which was taken to the Appellate Court, case No. 21707.

It appears that the aforementioned defendant was convicted in the Municipal Court on a charge of disorderly conduct and was fined \$1.00 and costs (\$6.00). He thereupon took an appeal to the Appellate Court, which court reversed the judgment of the lower court and entered judgment in favor of J. J. Moser, plaintiff in error, for court costs.

The Supreme Court has held that a city is not liable for costs in a suit to enforce an ordinance. See

City of Monmouth v. Popel, et al., 183 Ill. 634.

City of Centralia v. Nagele, 181 Ill. 151.

City of Carrollton v. Bazzette, 159 Ill. 284.

Anderson v. Schubert, 158 Ill. 75.

In view of the law as annunciated in the above quoted decisions, we are returning herewith, without our approval, transcript of proceedings and Appellate Court remanding order relating to the case under consideration.

Very truly yours,

JOHN A. COOKE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Closing of Saloons During War.

May 2, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your request for an opinion as to the power (a) of the mayor to close the saloons during the war, or (b) of the City Council to do so, in case it should become necessary or advisable to so close them, we beg to say:

Section 10 of Article II of Chapter 24 of the Revised Statutes (Cities and Villages Act) referring to the mayor reads:

“He shall perform all such duties as are, or may be prescribed by law, or by the city ordinances, and shall take care that the laws and ordinances are faithfully executed.”

The statutes contain other provisions relating to the powers and duties of the mayor, but none which, in our view are pertinent to the present investigation. Under the statutes relating to dram shops no saloon can be operated in the city except under a license from the corporate authorities of the city.

Section 1 of Article V of said Chapter 24 of the Revised Statutes, so far as is material, reads as follows:

“The city council in cities, and president and board of trustees in villages, shall have the following powers * * *: To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: *Provided*, that the city council in cities, or presidents and boards of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance: *Provided*, further, that in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses.”

In *The People v. Harrison*, 256 Ill. 102, the Supreme Court, citing authorities, said on page 107, referring to the sale of liquor:

“The power to license, regulate and prohibit can be exercised only through an ordinance of the city, and such ordinance must be a general one, specifying the manner and conditions of the issue of the license, the power conferred by it, and uniform in its operation upon persons within its scope.”

The City Council of the City of Chicago, acting pursuant to the authority conferred upon it by the statutes above referred to, has passed ordinances relating to dram shops which contain many provisions, but we regard as pertinent to the present investigation only those provisions to which we are now about to call attention, as follows:

That part of Section 1526 of the Code of 1911 which reads as follows:

“The mayor shall grant a license for the keeping of a saloon or dram shop within the city to any person who shall apply to him in writing therefor, and who shall furnish satisfactory evidence of good character.”

And that part of Section 1527 of the Code which, after providing that an applicant for a license shall agree to comply with all the regulations and conditions imposed by the laws of the state and the ordinances of the city, etc., further provides that each applicant—

“shall further agree that if the mayor shall be satisfied that at any time during the period of such license any such liquor is being so sold, served or given away in such saloon or dram shop contrary to and in violation of the agreement made in such application that the mayor may forthwith revoke such license.”

These ordinances, in our opinion, clothe the mayor with the power to grant and revoke saloon licenses under and pursuant to general ordinance passed by the City Council, but do not clothe him with power to determine whether intoxicating liquors shall be sold or prohibited in the city as a general rule of public policy.

On the other hand, such power is clearly vested in the City Council by the statutes which we have above quoted.

As to how far the City Council may go in prohibiting the sale of intoxicating liquors after licenses have been granted and during the license period covered thereby, we express no opinion, since that is a question which is immaterial until the City Council shall have first determined the broad question whether such sale shall be prohibited or not.

In case the City Council should see fit to prohibit the sale of intoxicating liquors by general ordinance, we do not think that the validity of its action would depend at all upon its reasons or motives for doing so.

Yours respectfully,

JAMES W. BREEN,

CHESTER E. CLEVELAND,

Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Claim of Louise Osborne Rowe for Compensation for
Department of Public Welfare.**

May 5, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of the 3rd instant, transmitting the letter of Louise Osborne Rowe dated April 30, 1917.

The position taken by Mrs. Rowe in her letter seems to us to have considerable foundation; but as will appear from what is hereinafter stated, there seems to be no reason for our considering exhaustively the question of the legality of her claim at this time.

As the appropriation ordinance for 1917 makes no appropriation for this claim, obviously you cannot recognize and pay the same unless you are either ordered to do so by some competent court, or you are authorized to do so and the funds therefor are provided by the City Council before July 1, 1917.

The proper course for Mrs. Rowe to pursue in this matter, as it seems to us, is first, to bring her claim to the attention of the City Council, as soon as possible, either directly or through the Finance Committee. The City Council may then, before July 1st, make an adequate appropriation for her department; and if that is done all further controversy will be eliminated.

On the other hand, if the City Council refuses to make such appropriation, then Mrs. Rowe may, if she so desires, bring suit against the city and have her rights established.

As before indicated, it would serve no useful purpose for us to prepare an opinion for you as to the legality of her claim, since you would have no means of paying the same, even if we reached a conclusion that her claim is entirely valid, and therefore it seems to us that there is no occasion for us to investigate thoroughly the questions involved, unless and until the Finance Committee or the City Council requests an opinion from us.

Very truly yours,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Expenses of Outside Judges Trying Cases in the Municipal Court.

May 5, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of a letter from the auditor suggesting that a representative of the Law Department, together with the chairman of the Finance Committee and the city auditor, should confer with the Chief Justice of the Municipal Court to determine whether there is some legal way to pay the expense bills of county judges who try cases in the Municipal Court.

It has been the practice since the formation of the Mu-

nicipal Court to call in judges from other jurisdictions from time to time in order to expedite the business of the Municipal Court, and in such cases ten dollars per day was allowed such outside judges for their expenses. This practice has been questioned and is now up for determination.

In pursuance of the suggestion of the auditor, a conference was had with the Chief Justice. The understanding that the writer had was that the question should be determined through the medium of the courts. It was agreed at that time that suit should be brought in order to definitely settle the question. Since then, however, Judge Moran, to whom the largest sum is due, has spoken to the writer several times and finally stated that none of the judges who had been called in in this way were willing to sue the city for compensation. Judge Moran stated that if a way was not found to pay his expenses he would drop the matter but would not bring suit under any circumstances. In response to his desires and word that has since come from the Chief Justice we deem it proper to state our views with reference to this question.

It can be stated at the outset that the amount involved is not great, and since the expenses of such judges are considerable while in the city, the amount allowed does not appear to be excessive. We have, however, nothing to do with the amount and will not take that feature of the case into consideration. We mention this only because we feel that unless there is some compelling reason which prevents the payment of the expense money justice demands that it should be paid.

After discussing the question with a number of persons, among them being the attorney of the chief justice and the assistant state's attorney in charge of county affairs, the writer has come to the conclusion that the basis for the objection lies in decisions of the Supreme Court which hold that Circuit Court judges are not entitled to such expense money when they conduct court outside of their jurisdictions. This was first decided in the case of *Hall v. Hamilton*, 74 Ill. 437, and reaffirmed in *Hogan v. Stophlet*, 179 Ill. 150.

By the above cases it was decided that Section 16 of Article VI of the Constitution of 1870 prohibited the payment of such expense money to Circuit Judges even though they were put to expense in traveling to other jurisdictions. A similar provision of the Constitution relating to Supreme Court judges appears in Section 7 of Article VI.

There are other decisions which bear on the question, an interesting case being *Town of Bruce v. Dickey*, 116 Ill. 527, which goes more into detail as to what the constitutional provisions above mentioned really mean.

We are of the opinion that the rule does not apply to County Judges, against whom no such constitutional prohibition exists. There seem to be good reasons for having such a provision in the case of Supreme and Circuit judges which do not exist in the case of county judges. One of these reasons is that there is provision made for adequate salaries for judges of the Supreme and Circuit Courts. Another is the fact that any extra compensation that is paid to them must come at least partly from the State, and, therefore, in a sense the same governmental agency is paying extra compensation to an officer.

It would seem to us that the very fact that this constitutional prohibition appears twice in the Constitution, at one place directed against the Supreme Court judges and at another place directed against the Circuit Court judges, but does not appear in the case of judges of the County and Probate Courts, who are also constitutional officers, conclusively answers the point that the Constitution stands in the way of such payment. It is insisted that public policy demands that the other judges should stand on the same footing with respect to this subject matter, but we cannot view it in that light by reason of the fact just stated. County judges who act in the Municipal Court are paid by a different governmental agency, and, therefore, another of the reasons does not hold.

After full consideration, we have come to the conclusion that it is entirely proper to honor requisitions of the kind spoken of in the letter of the auditor. That letter states that there is a requisition attached to same. The writer is

unable to find such a requisition at the present time. It may have been attached to the letter originally, but if so, it was either withdrawn by the Chief Justice or by the auditor. We mention this in order that a new requisition may be obtained.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Ordinance Relating to Venereal Diseases.

May 12, 1917.

HON. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

For further reply to that part of your letter of May 5, 1917, relating to the ordinance under consideration pertaining to venereal diseases, which requests that we "submit to the committee an opinion on the legality of the ordinance as a whole," we beg to say:

Section 1 of Article V of Chapter 24 of the Revised Statutes, so far as material, reads as follows:

"The city council in cities, and president of the board of trustees in villages, shall have the following power:

* * * * *

"Seventy-eight: To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease."

We believe that the power set forth in the above statute is accurately elaborated in Volume III of McQuillin on Municipal Corporations, Sections 899 and 905, which respectively read as follows:

"899. Power to make and enforce. One of the chief purposes for the institution of municipal government is the conservation of the public health and safety. No more important obligation is confided to municipal corporations. The nature of the ordinances they shall

adopt for this purpose is largely a matter within the discretion of the local authorities. Under the usual charter powers to preserve the public health, etc., *ordinances designed to protect the local community from infectious, contagious and pestilential diseases, from impure water, bad food, nuisances injurious to health and comfort, noxious odors and gases, unusual noises, etc., are usually liberally construed by the courts, and, unless clearly unreasonable and arbitrary, or demonstrably violative of some constitutional provision intended to protect the liberty of the individual or property rights, they will be sustained.*

“Within the power to preserve the public health is the power to create boards of health with authority to appoint officers and subordinates for this purpose; establish hospitals or asylums for the care of the sick or afflicted; promulgate reasonable regulations respecting the practice of medicine, surgery and midwifery (if charter power exists or the matter is not controlled by state statute, which is often the case); forbid bringing within the limits insane persons and paupers; prohibit the use of poison and adulteration in drugs, medicines, chemicals, etc.; adulteration of milk, bread and other food products sold within the city; and, generally, to prevent and abate all public nuisances which are or may become detrimental to the public health.”

“905. Contagious and infectious diseases—quarantine. *The wise rule is well settled by repeated decisions and is everywhere enforced that the introduction and spread of infectious and contagious diseases may be prevented by reasonable municipal police regulation.* Of course, the necessity for such regulations must distinctly appear; however, in matters of this nature courts incline to defer to the judgment of the local authorities; and this position is reasonable. Their information as to the necessity of a given ordinance is usually more accurate than that of the court. For this purpose adequate quarantine regulations may be established and enforced in all proper cases whenever it appears necessary in the sound judgment of the corporate authorities; *hospitals and pest houses maintained, to care for the afflicted in a fitting manner, and to segregate the infected from the rest of the community; compulsory vaccination required; those afflicted with contagious diseases removed beyond the corporate limits; private buildings taken possession of and controlled temporarily by*

the public officers; and *practicing physicians within the urban area compelled, under penalty, to report immediately each case of smallpox, typhoid fever, cholera, etc.*

“So, under the reasonable exercise of the police power, clothing infected may be destroyed, and second-hand clothing may be required to be delivered to the proper officers for disinfection, and a reasonable price for such service paid. But it has been held that general power to prevent the introduction of infectious or contagious diseases, and power to preserve the health, etc., does not confer authority to make it unlawful, by ordinance, ‘to import, sell or otherwise deal in second-hand clothing or cast-off garments, blankets, bedding or bed clothes,’ with a proviso excepting the sale of such articles when not imported or which have not been used by persons having infectious diseases.”

From the foregoing it seems to us that the City Council has sufficient power to pass any ordinance which is reasonably calculated to protect the health of the people, and that the City Council is the judge of the regulations that are necessary and the diseases which should be controlled, subject only to its action being reasonable and not coming in conflict with any constitutional or statutory inhibition.

It is common knowledge that medical science has in recent years made very great progress, and, furthermore, it is a recognized principle of law that police regulations for the health and safety of the people may be quite proper in large, congested centers of population which possibly might not be proper in sparsely settled communities. (*Biffer v. City of Chicago*, decided at the April Term of the Supreme Court.)

Applying the foregoing specifically to venereal diseases, our opinion is that the City Council has the power to pass ordinances for the reasonable regulation of such diseases and to determine which of such diseases should be regulated.

We are advised, that it is a well-known and established medical fact that venereal diseases are contagious and that they very seriously injure the health of persons afflicted therewith. This is indicated in a marked degree to the layman by the fact that the United States Government is making a special effort to control and stamp out these diseases among its soldiers.

Assuming that from a medical point of view, these diseases are as above indicated, it appears to us that the persons afflicted with them are subject to such proper regulation and control by the municipality as is necessary or proper to prevent their spread.

With respect to the particular ordinance which has been submitted to us, we, of course, would not attempt to pass any opinion upon the propriety, in detail, of the specific regulations which are provided, since that is a legislative question; but we believe that the ordinance as a whole will be sustained by the courts under the police power to which we have above called attention.

Yours very truly,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Claim for Loss of Property at Clarendon Beach.

May 16, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication addressed to the corporation counsel, transmitting the claim of N. DeFrees for damages for loss of property at the Clarendon Beach, has been referred to the undersigned.

It appears from the statement of Mr. DeFrees that on August 2, 1916, he deposited his pocketbook, together with other articles, in an envelope for safekeeping while in bathing, and when the envelope was returned to him the pocketbook, together with its contents, was missing.

From a report furnished to us by the director in charge at the Clarendon Beach, we find that when the loss of the pocketbook was reported to him an investigation was immediately made and he is of the opinion that the pocketbook was never placed in the envelope with the other articles and was

never left in the room provided for the safekeeping of valuable articles.

The checking of valuable articles at Clarendon Beach is maintained and conducted gratuitously by the city for the convenience of the bathers. A notice is printed on each envelope given to persons for checking articles stating the City of Chicago assumes no liability for the loss of the contents of the envelope, but will use every precaution to prevent the same.

There was no negligence on the part of the city. It did everything reasonable in the exercise of its duties for the care and safety of the property of the claimant, and having performed said duties it has done all that can be required of it;—therefore, we are of the opinion that the city is not liable for the payment of this claim.

Yours very truly,

CHARLES E. PEACE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Adoption of a New Standard for Shutoff Box and New Round Way Stop-cock.

May 17, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Replying to your communication asking this department to advise you on the following propositions:

1. As to the proper action to take with reference to the adoption of a standard new round way stop-cock.
2. Whether the city can enter into an arrangement whereby it will manufacture and sell the same, at cost, to the plumbers, for installation.

As to the first proposition, we call your attention to Section 1783 of The Chicago Code of 1911 applying to permits, which reads in part as follows:

“All applications for permits for the introduction

or use of water supplied by the city shall be made in writing upon printed forms furnished by the Department of Public Works, the blanks to be specifically and properly filled in and signed by the owner or duly authorized agent of the owner, and no work whatever shall be done in the street or outside a building, by any plumber or other person for the purpose of making any connection to or with any city water main or pipe until after the issuance of such permit."

We also quote Section 2737 of The Chicago Code of 1911, providing for connections of water mains, etc., which reads as follows:

"§ 2737. PERSONS MAKING CONNECTIONS TO PROVIDE SHUT-OFF BOXES.) Any person, whether owner or occupant, or person in possession, charge or control of any building, structure or premises with or to which it is desired to make connection with the waterworks system of the city, shall provide and install at his own expense a buffalo or shut-off box, and such buffalo or shut-off box shall be constructed and located to the satisfaction and approval of the commissioner of public works. No permit shall be issued to connect any building, structure or premises with the waterworks system of the city unless such connection be equipped with a buffalo or shut-off box in accordance with the provisions of this section."

After having talked the matter over with both Mr. W. L. Lucas, superintendent of the Water Pipe Extension Bureau, and Mr. W. J. McCourt, superintendent of the Water Bureau, I find that the department is now, and has been for years, furnishing taps, etc., to plumbers, and when a permit is issued, you charge a lump sum, for example, \$5.00; that embraces the cost of the material and labor your department furnishes and includes a fee for the issuance of the permit, but none of the items are set out specifically. Part of this is done, however, under that part of Section 2735 which provides that the tapping must be performed by a city employe. The shut-off cock and the box that goes over it, to protect it from filling with dirt, etc., is secured in the open market by the plumber.

Instead of your issuing a departmental order, I regard it safer to amend Section 2737, which I have revised, to read as follows:

“§ 2737. PERSONS MAKING CONNECTIONS TO PROVIDE SHUT-OFF BOXES.) Any person, whether owner or occupant, or person in possession, charge or control of any building, structure or premises with or to which it is desired to make connections with the waterworks system of the city, shall provide and install at his own expense a shut-off box, *including a round way stop-cock, according to plans and specifications provided by the commissioner of public works*, and such shut-off box, *including such round way stop-cock*, shall be constructed and located to the satisfaction and approval of the commissioner of public works. No permit shall be issued to connect any building, structure or premises with the waterworks system of the city unless such connection be equipped with a shut-off box *including a round way stop-cock*, in accordance with the provisions of this section.”

Under Section 2737, as revised, every person is obliged to use a standard form of stop-cock.

The application you issue under Section 1783 should contain a provision for the installation of a standard stop-cock and where work is done by special assessment you should also include the proper clause in the specifications.

While it is the purpose to charge and deliver the standard stop-cock in question, at the time of the issuance of the permit, it is also intended that any person can secure the standard stop-cock in the open market if the point is raised, but the same must meet with the approval of the commissioner of public works, and be according to plans and specifications as provided by him.

As to the second proposition, I have tried to eliminate any question that might be raised as to whether it was within the power of the city to sell the standard stop-cock referred to, by revising Section 2737, and making it obligatory upon the person making the application to secure same, but as to where he may secure one, is open to him.

If the draft of the amendment to Section 2737 meets with your approval, it ought to be referred to the City Council with a communication explaining its purpose and someone from your department should be present at the time the same

is considered by the committee. I might add that Mr. Lucas has gone over same and believes it will meet the situation.

It is my opinion, with the passage of Section 2737, as revised, that you can insert a provision in the application and permit and include a clause in the specifications, for the standard stop-cock in question, where the construction of the service pipes is by special assessment, thereby carrying out your object for a standard stop-cock, and in so doing you have obliterated all objections that might be raised by a taxpayer, to any ordinance which would specifically give you the authority to sell the same.

We enclose herewith, the draft of Section 2737, as revised.

Yours very truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Race Track Information Letter.

May 18, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

Replying to your letter of the 12th inst., in which you transmit printed circular from the American Thoroughbred, asking to be advised as to whether it is a violation of an ordinance published on page 1650 of the Council Proceedings of July 22, 1912, which reads as follows:

“Section 1. No person shall sell, offer for sale, give away, display, exhibit, distribute or cause to be distributed any newspaper or other publication, circular, blank, handbill, pamphlet or other written or printed matter giving or purporting to give information concerning the rates at which bets are offered or taken in the city or elsewhere, or the odds being given or taken on bets within the city or elsewhere, *or advise as to betting* or the ratio at which bets should be made upon the result of any trial

or test of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment or election." * * *

The printed circular is clearly a race track proposition, and it contains this language in particular—"We would like to have you 'get in' on these and we are making a special price of \$2 for the information on *both horses*."

I am of the opinion that the distribution of this circular is clearly a violation of the ordinance referred to.

Yours very truly,

ANTON T. ZEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Jurisdiction of City Over Municipal Market Building.

May 18, 1917.

HON. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

In reply to your inquiry as to what department of the government has jurisdiction of the Municipal Market Building located at South Chicago, we beg to say:

1. We have been unable to look up this matter until the present time by reason of our office force being absorbed in taking care of cases in court and other matters which imperatively demanded immediate attention.

2. Section 1601 of The Chicago Code of 1911 reads as follows:

"There is hereby created the office of superintendent of the Dayton Street Market. He shall be appointed by the mayor, by and with the advice and consent of the City Council."

There is a like provision, the necessary changes being made, with respect to the West Randolph Street Market (Section 1589 of The Chicago Code of 1911), but we find no such ordinance relating to the Municipal Market Building at South Chicago.

3. All that we have been able to discover relating specifically to the department which is to have charge of this Municipal Market Building is an order passed on June 30, 1916, appearing at pages 1080 and 1081 of the Council Proceedings, and reading as follows:

“ORDERED, That the Municipal Market Building at South Chicago be and is hereby placed under the direction of the Department of Weights and Measures, and the inspector of weights and measures is directed to assign one of his most experienced civil service employes to the investigation of the problem of operating same, provided that the market shall not be opened until a definite plan is worked out of bringing the producer to the consumer, which is a problem depending upon investigation of the entire matter.”

We understand the foregoing to be only an *order* which, of course, would not operate to repeal existing ordinances.

2 McQuillin on Mun. Corp., Sec. 634.

People v. Mount, 186 Ill. 560.

Furthermore, there is reason to believe that by this order the Council intended to place the Municipal Market Building under the Department of Weights and Measures merely for the purpose of investigating the problem of operating the same, and not for the purpose of having charge of the building after it was put in operation. This view is confirmed by the Appropriation Ordinance passed at the same time (Council Proceedings, 1081), which provides for the salary of an employe “detailed on the investigation of the Municipal Market Building operation.”

4. By Section 24 of The Chicago Code of 1911, it is provided, so far as material, as follows:

“He (the comptroller) shall have supervision over the contracts, bonds, obligations, loans and liabilities of the city, the payment of interest, and over all the property of the city, and the sale or the disposition thereof.”

It will be observed that the ordinance above quoted is general in its terms and does not deal specifically with markets or market places.

5. Section 2069 of The Chicago Code of 1911, so far as material, reads as follows:

“It shall be the duty of said commissioner of public works, subject to the provisions hereof and the ordinances of the city, to take special charge and superintendence * * * of all markets and market places and all other public buildings in the city, belonging to the city, and of the erection of all public buildings.”

It will be observed that this last quoted ordinance deals specifically with the subject of markets and market places.

6. The rules of construction applicable to the situation above set forth are stated in 36 Cyc., at pages 1151 and 1152, as follows:

“Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.”

7. From the foregoing we conclude that the Municipal Market Building at South Chicago is under the jurisdiction and control of the commissioner of public works.

Yours very truly,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Forcible Removal of Patient to Hospital.

May 19, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

In reply to your request for an opinion as to your right and duty to forcibly remove from his place of residence and confine in a hospital a patient who is suffering from tuberculosis or typhoid fever, we beg to say:

Section 1 of Article V of Chapter 24 of the Revised Statutes, so far as material, reads as follows:

“The city council in cities, and president and board of trustees in villages, shall have the following powers.
* * *

“Seventy-eight: To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.”

Under this authority the City Council has adopted Section 1190 of The Chicago Code of 1911, which reads as follows:

“1190. EXAMINATION AND REMOVAL OF AFFLICTED PERSONS.) It shall be the duty of the commissioner of health to visit and examine, or cause to have visited and examined, all sick persons who shall be reported to him as laboring, or supposed to be laboring, under smallpox, cholera, or *any contagious or epidemic disease*, and cause all such persons to be removed to the cholera, smallpox, or other hospitals, or to such other safe and proper place as he may think proper, not exceeding three miles from said city and cause them to be provided with suitable nurses and medical attendance, at their own expense if they are able to pay for the same, but if not, then at the expense of the city.”

The statute above quoted seems to have clothed the City Council with power to pass the ordinance above quoted.

You will observe that this ordinance covers “*any contagious or epidemic disease*.” Obviously it is not a legal

question as to whether any particular disease is a contagious or an epidemic disease, except those which are specially named in the ordinance, viz., smallpox and cholera. Tuberculosis and typhoid fever are not so named. The question then is one of fact, or, rather, perhaps, of medical opinion and authority, whether tuberculosis and typhoid fever are contagious or epidemic diseases.

The commissioner of health has advised us that both tuberculosis and typhoid fever are contagious diseases, and it is our view that he is the proper authority to speak for the city on that subject.

You will also observe that by the ordinance above quoted the duty of removing such patients and caring for them in proper places is imposed upon the commissioner of health. Therefore, we are of the opinion that it is for him to say in what specific cases the patients should be taken and confined to proper hospitals.

Section 1190 of the Code, which is above quoted, is a part of Chapter XXXVIII; and Section 1171 of that chapter reads as follows:

“The commissioner of health, the assistant commissioner, the city physician, the secretary of the Health Department, and all physicians, employes, or inspectors who may be designated by the commissioner of health, shall have full police powers and shall have the right to arrest or cause to be arrested any person who violates any of the provisions of this chapter.”

Considering Sections 1171 and 1190, it is our opinion that the Department of Health, rather than the Department of Police, has the authority and is charged with the responsibility in the cases under consideration.

Yours very truly,

CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Emission of Smoke from Locomotive Engines.

May 21, 1917.

THE HONORABLE, THE MAYOR AND THE

CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On April 30, 1917, an order was passed by the City Council, as follows (Council Proceedings, p. 92):

“ORDERED, That the corporation counsel be requested to furnish this Council with an opinion as soon as possible as to the power of the city to prohibit the Chicago and North Western Railroad Company from causing or allowing its locomotive engines to stand and emit smoke and gases under the station of the North Western Elevated Railroad Company known as the Stub End Station on North Clark street, north of the Chicago river.”

In compliance with this direction of your Honorable Body, we beg to say that in our opinion the city possesses the power to regulate the operation of steam locomotives by the Chicago & North Western Railroad Company, under the elevated railroad station referred to, in such manner as to prevent smoke and gases from enveloping the station during the hours that it is used by the public.

The tracks of the Chicago & North Western Railroad Company were located on North Water street, where this elevated station is situated, under the authority of an ordinance passed by the City Council on July 17, 1848, (Special Ordinances of Chicago, 1915, page 704.) In that ordinance the city did not expressly reserve any power of regulation over the construction and operation of the tracks of the railroad in that street, except as to the location of the tracks in the street. Nevertheless, we believe that it is settled law that where a municipality permits a railroad company to lay tracks in its streets it may continue to exercise its usual police powers in reference to the use of such streets by the railroad and may prescribe reasonable regulations concerning the operation of cars therein.

The Supreme Court of this state has held, in the case

of *North Chicago City Railway Company v. Lake View*, 105 Ill. 207, that under the power to control and regulate the use of the streets and to define and declare what shall be deemed nuisances, and to prevent and abate the same, a municipality may, in the absence of any conflicting legislative grant, pass an ordinance prohibiting the use of steam in the operation of street cars upon its streets. In the following cases also it has been recognized that the use of steam in certain specified streets may be prohibited by the city where such action does not impair any vested right of the company:

Railroad Company v. Richmond, 96 U. S. 521.

Southern Pacific Company v. City of Portland, 177 Federal 958; 227 U. S. 559.

If an ordinance should be passed prohibiting steam locomotives of the Chicago & North Western Railroad Company from standing or passing underneath the station of the North Western Elevated Railroad Company, during the hours that this station is used by the public, it would be a very material benefit to those who use this means of transportation, and such a regulation we believe would be sustained as a valid exercise of the police power. The conditions at the point in question are so peculiar to this location that no objection, in our opinion, can be raised to the passage of an ordinance which is not general in character but which relates to this particular situation.

Very truly yours,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payments of Appropriation for Chicago Infants' Asylum.

May 23, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We beg to acknowledge the receipt of your communication attaching a letter addressed to the city treasurer from

the Chicago Law Enforcement League in reference to the case of *Dunn v. The Chicago Industrial School*.

In the communication that was forwarded to the city treasurer he was advised to secure an opinion from counsel before paying with city funds certain items appropriated in the Annual Appropriation Bill, among which items appears to be an appropriation of \$12,000, under Account 44-T to the Chicago Infants' Asylum for supplies, maintenance and reception and care of abandoned and destitute children, not including salaries.

In regard to the protest filed with the city treasurer against the payments of certain institutions out of the public funds of the city, we desire to advise you that the protest is based on a Constitutional provision appearing in Section 3 of Article VIII of the Constitution of Illinois of 1870, which section provides as follows:

"Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."

We desire to direct your attention to the fact that the Chicago City Infants' Hospital was established by the city by the following ordinance, passed by the City Council on July 12, 1887.

"An ordinance to establish and maintain a hospital for infant children who may be found destitute of care and protection.

"Be it Ordained by the City Council of the City of Chicago:

"1st: That the building standing at the southeast corner of La Salle avenue and Superior street, being No. 191 La Salle avenue in the City of Chicago, be and the same hereby is constituted and established a hospital of the City of Chicago to be known as the Infants' Hos-

pital, for the reception and nurture of infant children found abandoned in any of the streets or public places of the city, or otherwise destitute of proper care and protection.

"2nd: Said building shall be used for the purposes of such hospital so long as the owners thereof shall permit, and this council shall see fit to continue such use.

"3rd: Said hospital shall be in charge of a superintendent to be designated by the mayor of Chicago and such assistants as the superintendent may find it necessary to call to her aid in the conduct of the hospital, provided the services of the superintendent and assistants shall be that of volunteers and that no salary shall be charged by any of them on account of services.

"4th: The expenses (other than that of rent and salaries) of maintaining and conducting such hospital shall be paid out of any funds belonging to the City of Chicago now unappropriated or that may be hereafter duly appropriated for that purpose, and the comptroller shall pay the same upon requisitions made by the superintendent of the hospital quarter-yearly, commencing on July 1, 1897, provided the amount to be paid by the City of Chicago on such account shall not exceed in any one year the total sum of twelve thousand dollars (\$12,000).

"5th: This ordinance shall take effect and be in force from and after its passage and due publication."

You will observe that the provisions of the ordinance authorizes the mayor to designate the superintendent of said hospital, and under the provisions of the ordinance the mayor of Chicago may, at any time he sees fit, change the superintendent of the institution in question and appoint any individual he deems advisable.

The superintendent of the said institution is responsible to the mayor of the city for its proper management.

This institution, in our opinion, is clearly a municipal institution, and does not come within the purview of Section 3 of Article VIII of the Constitution of 1870.

We are advised that as a matter of fact Jew and Gentile, black and white, Catholics and Protestants, are daily brought to and received by this institution and no question as to their religious belief is ever asked, and no religious teaching

of any kind is indulged in by the inmates or persons in control of this institution.

We, therefore, beg to advise you that, in our opinion, this institution is a department of the city government of Chicago, and we see no legal objections to your complying with the provisions of the ordinance creating it and paying to the institution at once any sum of money that may be due it out of the appropriation of \$12,000 made in the Annual Appropriation Bill of 1917 under Account 44-T.

We recommend that payment be made to this institution without further delay.

Yours very truly,

JAMES W. BREEN,

GEORGE A. CURRAN,

Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Payments Out of Appropriations for House of Good
Shepherd and Erring Women's Refuge.**

May 24, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your request for an opinion as to your right to deliver warrants to the Chicago Erring Women's Refuge for Reform and to the House of Good Shepherd, in payment of money due these institutions under the provisions of an Act of the General Assembly of the State of Illinois, passed March 31, 1869, and appropriated for in the annual budget for the year 1917, as follows:

“The amount of fines of police courts made payable to this fund by an Act of the General Assembly, approved March 31, 1869, being one-half of the fines imposed upon inmates of houses of ill-fame.”

The statute authorizing the City Council to appropriate a portion of certain fines to the Chicago Erring Women's

Refuge for Reform and the House of Good Shepherd, of Chicago, is as follows:

"An act for the benefit of the Chicago Erring Women's Refuge for Reform and the House of the Good Shepherd of Chicago.

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all the fines collected by the City of Chicago, from keepers, inmates and visitors of houses of prostitution and from any person in any way connected therewith, shall be set aside by said City of Chicago for the sole use and benefit of the Chicago Erring Women's Refuge for Reform and the House of the Good Shepherd, in said city, and shall be equally divided between said two institutions.

"Section 2. The Board of Trustees of said Erring Women's Refuge, and the superior and assistant of said House of the Good Shepherd, shall have power to draw, monthly, upon said fund, by their respective checks—that of the former to be drawn by the president, and countersigned by the secretary, and that of the latter to be drawn by the superior, and countersigned by the assistant superior; said checks to be drawn upon the treasurer or other custodian having said moneys in control or possession.

"Section 3. Each of the aforesaid institutions shall render an annual account of the expenditures and receipts to the common council of said city."

The above statute was approved March 31, 1869, prior to the adoption of the Constitution of 1870. Under the Constitution of 1848, which was the one in force at the time of the passage of the above statute, it was constitutional, and there does not appear to have been anything in the Constitution of 1848 to prohibit the City Council from complying with the provisions of this statute. The statute provides that the fines shall be set aside annually and divided for the sole use and benefit of the Chicago Erring Women's Refuge for Reform and the House of Good Shepherd of said city, and shall be equally divided between the two institutions, and the City Council has from that time on annually appropriated in its annual budget that portion of the fines required by the above statute to be paid to both institutions referred to herein.

The statute passed in 1869 did not authorize the city to enter into any contract with either of the institutions for the purpose of agreeing to pay any specific amount of money for receiving prisoners guilty of the offenses for which a portion of the fine was directed to be paid to both institutions. It simply authorizes the City Council to set aside, for the sole use and benefit of the Chicago Erring Women's Refuge for Reform and the House of Good Shepherd in said city, all the fines collected by the city from the keepers, inmates and visitors of houses of prostitution and from any person connected therewith. And, in order to do that, the City Council must annually make an appropriation for that purpose.

It must be conceded that neither one of these institutions are public corporations, and, under the Constitution of 1870 now in force in this state, cities are prohibited from making donations to private corporations, and the action of the City Council in making the appropriation referred to in this communication in the annual budget of 1917 is invalid and void, and in conflict with that section of the Constitution which prohibits cities from making appropriations to private corporations.

On February 16, 1867, the State of Illinois passed an act providing, among other things, that the treasurer of the County of Cook and the treasurer of the City of Chicago pay to the Washingtonian Home, in quarterly installments, for the support and maintenance of said institution, ten per cent of all moneys received for all licenses granted by authority of said county or city for the right or privilege to vend or sell spirituous, vinous or fermented liquors within said County of Cook and City of Chicago.

In 1895 the City of Chicago refused to pay to the Washingtonian Home the sum of \$25,000 that was claimed to be due under the provisions of the Act of 1867, and a petition for *mandamus* was brought by the Washingtonian Home to compel the city to comply with the terms of the statute and pay to said institution the sum of \$25,000, which they alleged to be ten per cent of the fines collected between January 1, 1893 and April 1, 1894. The city filed a general

demurrer to said petition which was sustained by the court and the petition dismissed. The Washingtonian Home appealed to the Supreme Court, and, among other things, urged that, inasmuch as the statute was passed under a constitution which did not prohibit its passage, it was a valid enactment and that the city should comply with its provisions. In discussing that point the court, in 157 Ill. 414, at page 428, said:

“We do not think the Constitution operated retrospectively. Under Section 7 of the Act of 1867, the city was authorized to make an annual donation to the home, but upon the adoption of the Constitution, in 1870, all cities were thereafter prohibited from making donations to a private corporation. The donations made prior to the adoption of the Constitution remained unaffected, but donations after that time were prohibited.

“But it is insisted in the argument, that as the city paid over this fund, quarterly, for a period of over twenty years, as required by Section 7 of the act, and as the payment was recognized each year in the annual appropriation ordinances of the city, and as the city has received a substantial benefit each year, in return the city is bound by its ratification of the act, and is now estopped from denying its constitutionality. By the adoption of the Constitution in 1870, the seventh section of the Act of 1867 was repealed, and from that time it was nugatory, and the fact that the officers of the city for twenty-two years paid over to the home, annually, a portion of the revenue of the city in violation of law could not work an estoppel on the city. Nor did the fact that the City Council annually, in its appropriation ordinances, recognized and made provision for the payment of the fund to the home estop the city from refusing payment at any time it might elect to do so. The revenues of the City of Chicago arising from licenses, from taxation, and from all other sources, are owned by the city and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenue of a city cannot be donated by the officers of the city, or by the City Council, to any person they may think entitled to the same, but, on the other hand, such revenues can only be paid out or appropriated by the City Council or its officers in the manner and for the purposes authorized by law. Where the lawful power does not exist the payment is unauthorized and void, and the city will

lose no rights where the money has been unlawfully paid out by its officers. The city having no power to pay over its revenues to the home, the fact of payment for a series of years will not estop it."

The questions involved in the suit of the Washingtonian Home of Chicago against the city for the purpose of compelling the city to comply with the provisions of the Act of 1867 are exactly the same as the question that we are asked to determine as to your right to issue warrants to the Chicago Erring Women's Refuge for Reform and the House of Good Shepherd of Chicago, under the provisions of the Act of 1869; and it is our opinion that the adoption of the Constitution of 1870, in which it was provided that all cities in the State of Illinois were thereafter prohibited from making donations to a private corporation, operated as a repeal of the Act of 1869 requiring the City of Chicago to set aside for the sole use and benefit of the Chicago Erring Women's Refuge for Reform and the House of Good Shepherd all fines received from the keepers, inmates and visitors of houses of prostitution, and from any person in any way connected therewith, and to divide said fines equally between said institutions. The act of the City Council in providing for this in its Annual Appropriation Bill amounts to a gift or donation from the city to the institutions in question, and is in conflict with the Constitution of the State of Illinois and void.

We, therefore, beg to advise you that you should decline to issue warrants to either the Chicago Erring Women's Refuge for Reform or the House of Good Shepherd of Chicago for any portion of fines received by the city from keepers, inmates and visitors of houses of prostitution or from any person in any way connected therewith.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

[NOTE.—See contrary opinion in this volume. Both are published because the suit instituted did not finally decide the question.]

Validity of Free Lunch Ordinance.

May 28, 1917.

HON. WILLIS O. NANCE, Chairman, Committee on Health.

Dear Sir:

Replying to your communication of the 25th inst., directed to this department by the city clerk, in which he requests that an opinion be furnished your committee as to the validity of the so-called "free lunch ordinance," we beg to quote from a copy of an opinion rendered to your committee upon a similar ordinance under date of December 15, 1913, addressed to yourself as chairman, signed by Nicholas Michaels, Assistant Corporation Counsel, and approved by Wm. H. Sexton, Corporation Counsel, which reads as follows:

"December 15, 1913.

"HON. WILLIS O. NANCE, Chairman, Committee on Health.

"Dear Sir:

"In accordance with the communication of Francis D. Connery, Esq., city clerk, of the 10th inst., in which he submits to this department the request of your committee for an opinion as to the validity of the ordinance prohibiting the giving away of 'free lunch' in dram-shops, I wish to say that in my opinion the ordinance can be sustained under the police power.

"Without wishing to tire your committee with a citation of authorities, it is sufficient to state, that by a long line of decisions based upon the laws of the state, 'the liquor business is one peculiarly subject to the police power on account of the multitude of evils which result from it. Police regulation of that business has always been sustained, as having for its object the prevention of intemperance, pauperism and crime and diminishing, as far as practicable, the injurious consequences to the public resulting from the business.' (*City of Chicago v. Netcher*, 183 Ill. 113.)

" 'Restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits.'

(*Schwuchow v. City of Chicago*, 68 Ill. 444).

" 'All uses of property or courses of conduct which are injurious to the health, comfort, morals, safety and

welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power may result in inconvenience or loss to individuals * * *'

(*Sign Works v. Training School*, 249 Ill. 439).

"Uniform restrictions and prohibitions in whole or in part, have universally been upheld by the courts as a valid exercise of the police power over the dramshop.

"In the particular case now under consideration your committee is therefore warranted in applying to the ordinance the foregoing tests, and if you find that its provisions will promote the public health and welfare, you may safely recommend the ordinance for passage."

We concur in the views expressed in the foregoing opinion.

Yours very truly,

ANTON T. ZEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Appointment of Member of Sub-Committee Who Is Not an Alderman.

June 4, 1917.

HON. EUGENE H. BLOCK, Acting Chairman, Committee on Finance.

Dear Sir:

In reply to your letter of the 2d instant as to the legality of the appointment of Si Mayer, who is not a member of the City Council, as chairman of a sub-committee of the Council Committee on Schools, Fire, Police and Civil Service, we beg to say:

Rule 40, so far as material, reads as follows (Council Proceedings, April 23, 1917, page 4):

"The following shall be the standing committees of the City Council and the membership thereof: * * *

"10. On schools, fire, police and civil service; 15 members."

In 8 Cyc., at page 337, under the heading "Committee" it is said, in part:

"In parliamentary law, a portion of a legislative body, comprising *one or more members*, who are charged with the duty of examining some matters especially referred to them by the House, or of deliberating upon it, and reporting to the House the result of their investigations or recommending a course of action."

According to the Century Dictionary a subcommittee is:

"An under committee, a part or division of a committee."

It is our opinion that by the foregoing authorities this subcommittee should be composed exclusively of members of the Council, and we think that on matters referred to a subcommittee the original committee, and through it the City Council, should have the judgment and discretion of members elected by the people, rather than the judgment and discretion in whole or in part of persons not so elected.

Yours very truly,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Leave of Absence of Patrolmen.

June 6, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of recent date, asking us to furnish you with an opinion as to whether or not you have authority to allow patrolmen in the Police Department to be on a leave of absence for one day in each month in addition to the annual furlough of fifteen days.

In reply, we beg to advise you that Section 1910 of the ordinance commonly known as the "Police Reorganization Ordinance," passed December 30, 1912, provides, in part, as follows:

“Subject to the provisions of this ordinance the management and control of all matters relating to the Department of Police, its officers and members, are hereby vested in the general superintendent of police. Provided, that the number of districts to be established shall not be less than the present number of precincts (44), unless otherwise ordained by this Council.

* * * * *

“It shall be the duty of said general superintendent of police to preserve the peace and secure good order and cleanliness within the City of Chicago, and to that end he shall enforce all laws and city ordinances and the orders of the City Council and of the Mayor of the City of Chicago.”

Under the provisions of the city ordinances you are charged with the duty of preserving the peace and maintaining order throughout the city, and in the performance of that duty you are vested with the power and have the authority to so assign commanding officers and patrolmen of the Police Department in such a manner as will best enable you to carry out your duties as general superintendent of police. All commanding officers and patrolmen in the Police Department are at all times of the day or night subject to call for duty, whenever the welfare of the city demands.

As general superintendent of police you are vested with a wide discretion as to the best manner of assigning police officers, and the number necessary to have on duty in any locality at any particular time of the day or night, and in the performance of your duty as general superintendent of police you may find it necessary to require officers to remain on active duty any number of hours or days that you deem it expedient for the preservation of the peace or the enforcement of the laws. This being true, it is also your duty to see that the men under your command are afforded such reasonable privileges as you in your discretion may deem advisable so as to enable them to maintain a degree of efficiency in the performance of their duties that will have beneficial results in enabling them to properly maintain the efficiency of the Police Department, and to intelligently discharge the duties of police officers.

If, in the exercise of that discretion, you deem it advisable and advantageous, and for the best interests of the City of Chicago to so arrange the force of patrolmen under your command as to permit each patrolman to have a leave of absence for one day in each month, you have the power and authority to do so. Under the city ordinances, all city employes are granted a vacation period, and members of the Police Department are also permitted under the ordinances to have a vacation not exceeding 15 days, but this annual order of the City Council in regard to vacations is not intended to prevent the general superintendent of police from so assigning the patrolmen under his command in such a manner as will enable him to most efficiently secure the performance of police duty. Police officers who work seventeen and eighteen hours out of the twenty-four should not be compelled to live up to regulations prescribed primarily for employes of the city who work only eight hours per day for five days a week and for five hours on Saturday. Police officers are constantly held on reserve duty, and very frequently are not given an opportunity to sleep while so assigned.

This condition of affairs is well known to all, and we have no doubt that your inquiry is based upon the fact that you desire to afford the patrolmen who work seven days a week and in addition to that are constantly called upon to perform police duty when not on actual assignments, and who are also very frequently held on reserve duty and not permitted to return to their homes, an opportunity to secure one full day's rest a month.

We are of the opinion that under the ordinances you have the power and authority to grant the patrolmen in the Police Department a leave of absence one day in each month in addition to the annual furlough of fifteen days allowed them.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Leasing of Space in Public Comfort Stations.

June 7, 1917.

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO.

Gentlemen :

The Council order of March 26, 1917, appearing on page 4,000 of the printed Journal of the Council Proceedings, requesting an opinion as to the right of the City of Chicago to operate or lease space in the public comfort stations for shoe shining stands, newspaper stands, etc., has been referred to me.

In reply thereto, I beg to say that the city may lease space in buildings erected for municipal purposes to be used incidentally for private purposes, provided such private use does not interfere with the application of the space to legitimate public needs.

In Dillon on Municipal Corporations, 5th Ed., Vol. III, Sec. 997, pages 1594 to 1596, it is said :

“In erecting or acquiring public buildings for corporate purposes a municipality is *not restricted to its present necessities*, but may anticipate and make provision for its *reasonable future necessities*. Although the building may be held for public use, the municipality may allow the entire building, or a part thereof, to be used incidentally for *private purposes for compensation*, and may *make leases of surplus* space for the purpose of deriving an income therefrom, provided, always, such private use or such leases do not interfere with the application of the building to the legitimate public needs of the municipality. But although the municipality may *make reasonable provision for future wants* in erecting a public building, and may lease the surplus space resulting therefrom, it will not be permitted under cover of so doing to erect a building not in fact for public needs as they may arise, but for the *express purpose of devoting* the building to *private purposes*, wholly or in part.”

It seems to be generally conceded that a municipal corporation, having erected a building in good faith for municipal or public purposes, has the right when parts of it are

not needed for public use, or when at intervals the whole building is not so used, and when it does not interfere with its public use, to permit it to be used for private purposes.

Cases so holding are:

Bates v. Bassett, 60 Vt. 531; 1 L. R. A. 166.

French v. Quincy, 85 Mass. 9.

Worden v. New Bedford, 131 Mass. 23.

Lowry v. Forest City, 39 Pa. Superior Court 276.

Gottlieb, etc. v. Macklin, 109 Md. 429; 31 L. R. A. (n. s.) 580.

I am of the opinion that the same rule of law would apply to public comfort stations erected by the city as to buildings erected for municipal purposes, and therefore, the City of Chicago has the right to lease such space in public comfort stations as is not required for public use.

As to the right of the City of Chicago to operate shoe shining stands, newspaper stands, etc., in connection with the conduct of the public comfort stations, I am of the opinion the city has no such power and is without authority to operate or conduct the same.

Yours very truly,

CHARLES E. PEACE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Trees for Improvement Associations.

June 8, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of May 23d, requesting to know whether or not it is strictly legal for the Bureau of Parks, Playgrounds and Bathing Beaches to give trees to improvement associations or individuals for planting in the public parkways, with the provision that all work incidental to the planting and the soil necessary for the nourishment of the trees are to be furnished by the recipient.

In reply thereto, we beg to state that we are of the opinion that the commissioner of public works or the Bureau of Parks, Playgrounds and Bathing Beaches under his jurisdiction, and the officers thereof, having the power under existing ordinances to plant trees in the public parkways, can also under the power vested in them give trees to improvement associations or individuals that may be desirous of planting trees in the public parkways under such restrictions as they may deem necessary to impose.

The recipient of such trees given by the commissioner of public works or the officers of the Bureau of Parks, Playgrounds and Bathing Beaches, by planting the trees so received in the public parkways, are assisting the city, and we see no reason why such planting cannot be done by the improvement associations or individuals, if it is done wholly without expense to the city.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Investment of a Portion of the Fund Accumulated in the
City Treasury Under the Traction Ordinances of 1907
in Bonds Issued by the Government of the
United States Known as Liberty Bonds.**

June 13, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You have requested of us an opinion as to the power of the city, acting through the City Council, to make an investment of the nature above indicated under the following conditions which we are to assume to exist without assuming any responsibility on the question as to whether they do or do not exist, viz.:

(1) That there is in said fund a large amount which is not invested but is on deposit in some bank or

banks, drawing 2% interest or approximately that amount.

(2) That the city has no immediate need of said fund for the use for which it has been accumulated, and will probably have no such need for quite a long time to come.

(3) That these Liberty Bonds constitute a good and safe investment; that they will produce not less than 3% interest on the amount invested in them, and that in all human probability these bonds can be converted, without loss, into money whenever the same shall be needed for the use for which the Traction Fund has been accumulated.

Section 1 of Article V of Chapter 24 (Cities and Villages Act) of the statutes, provides as follows:

“The city council in cities, and president and the board of trustees in villages, shall have the following powers:

“*First*—To control the finances and property of the corporation.”

In an opinion dated October 19, 1914, to Hon. John A. Richert, chairman, Committee on Finance, written by Leon Hornstein, assistant corporation counsel, and approved by John W. Beckwith, corporation counsel, the following conclusion is reached, viz.:

“We are, therefore, of the opinion that the City Council will be acting entirely within its powers if it authorizes the use of money from the traction fund for investment in duly authorized municipal bonds of the city, or, as is now contemplated, for a loan to the city on the pledging of such interest bearing bonds as security.”

On January 25, 1917, Mr. G. A. Curran wrote an opinion addressed to you, approved by Corporation Counsel Ettelson, in which the following conclusion was reached:

“We are, therefore, of the opinion that the City Council will be acting within its powers, if it authorizes the use of money in the Traction Fund for the purpose of purchasing outstanding judgments against the city.”

Section 2163 of McQuillin on Municipal Corporations, reads, in part, as follows:

"Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute."

In a note to the foregoing text the author says:

"A municipal corporation may invest its surplus funds in United States securities."

Footnote v. Salem, 14 Allen (96 Mass.) 87, is cited in support of the foregoing note.

In that case the question involved was not specifically discussed by the court in its opinion. But the point was made by counsel, as follows:

"The proposed investment of the money in United States securities is illegal. That is not among the purposes for which cities and towns may receive and pay money."

The above point was made by counsel for certain taxpayers who sought an injunction to restrain the use of certain municipal funds and who in their bill of complaint, among other things, set forth:

"that on the 14th of May, 1866, the City Council passed an order authorizing the treasurer to invest in securities of the United States any moneys not required for immediate use, being the proceeds of the water loan, and to dispose of the same at pleasure, as the interests of the city might require; and that, upon information and belief, it is the intention of the city to sell or pledge all the bonds, to the amount of \$500,000, during the present municipal year and invest the proceeds, not wanted for immediate use upon said works, in United States securities; which the city has no right to do."

The court held that the foregoing allegation of the taxpayers gave them no ground for complaint, and that the point made by their counsel, above stated, was not well founded, and said, on page 93:

"Nor do the allegations in the bill set forth any illegal or erroneous action by the city under the provisions of the act. The facts stated do not warrant any inference that money has been borrowed at usurious

rates, or that any improper or unlawful use has been made of the bonds or of funds belonging to the city.”

This case of *Foote v. City of Salem*, is the only authority we have been able to find in the limited time at our command which bears directly upon the question presented.

In view of the foregoing, we are of the opinion that the city, acting through the City Council, has the power to temporarily invest moneys from the Traction Fund in Liberty Bonds under the conditions hereinbefore assumed to exist.

Respectfully submitted,

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Rescinding Action on School Board Appointments.

June 22, 1917.

HON. WILLIAM HALE THOMPSON, Mayor, City of Chicago.

Dear Sir:

In response to your request for an opinion as to the power of the City Council, at their meeting to be held on Friday, June 22, 1917, to reconsider and rescind, if they so desire, their action taken on June 18, 1917, in confirming your appointees as members of the Board of Education, we beg to advise you:

The essential facts are that, pursuant to the statute in such case made and provided, you made the appointments here involved and submitted them to the Council for their approval, at a meeting held prior to June 18, 1917. These appointments were investigated by the Council, and on June 18, 1917, by a vote of 44 to 25, the Council concurred therein. (Council Proceedings, June 18, 1917, page 547.)

At that same meeting, a motion was made to reconsider such vote. This was followed by a motion to lay the motion to reconsider on the table. The motion to lay on the table prevailed.

These appointees thereafter duly qualified and took possession of their offices and entered upon the discharge of their duties as members of the Board of Education.

Said meeting of the Council, held June 18, 1917, duly adjourned to meet on Friday, June 22, 1917. (Council Proceedings, page 645.)

The contention is now made that at the meeting to be held on June 22, the motion to reconsider may be taken from the table, and that the Council then has the power to reconsider and rescind its action on June 18, 1917, with respect to these appointments. The reasoning on which this contention is based is: That Rule 29 of the Council, relating to taking any motion or proposition from the table, applies only to the same meeting at which the action to table was taken; that under Rule 52 of the Council, Robert's Rules of Order govern the taking of matters from the table, except on the day when the same are laid on the table, and that by Robert's Rules of Order, any matter may be taken from the table at the next succeeding meeting. In other words, it is argued that, while under Rule 29, a matter laid upon the table can be taken therefrom at the same meeting only by a two-thirds vote of the aldermen, yet, under Robert's Rules of Order, such matter can be taken from the table at the next succeeding meeting by a majority vote.

We do not agree to this contention. Said Rule 29 reads as follows:

“A motion to simply lay a question on the table shall not be debatable; but a motion to lay on the table and publish, or any other condition, shall be subject to amendment and debate.

“A motion to take any motion or other proposition from the table may be proposed at the same meeting at which such motion or proposition was laid upon the table, provided two-thirds of the aldermen vote therefor.”

It is our opinion that this rule covers the entire subject of taking matters from the table and supersedes the ordinary parliamentary practice which is set forth in Robert's Rules of Order, under the well-known rule of statutory construction, *expressio unius est exclusio alterius*—the expression of one thing excludes other things; and that even when exercising their ordinary legislative functions, the City Council

may take from the table a matter laid thereon only at the same meeting, and then only by a two-thirds vote.

But we deem it unnecessary to consider and discuss the foregoing contention at the present time, for the reason that the present situation is governed and controlled by a different proposition.

In confirming these appointments, the City Council performed an executive or, at any rate, a *quasi* executive duty, specifically imposed upon them by a statute of the State of Illinois, approved April 20, 1917, entitled, "And Act to amend sections 128 to 139 inclusive and section 161 of an act entitled 'An Act to establish and maintain a system of free schools,' approved and in force June 12, 1909," etc.

Such duty is imposed upon the Council by said statute in the following language:

"The said Board of Education shall consist of eleven members, to be appointed by the mayor, *with the approval of the City Council*, three of whom shall be appointed for the term of one year, two of whom for the term of two years, two of whom for the term of three years, two of whom for the term of four years, and two of whom for the term of five years."

Regardless of the general parliamentary practice, the law is settled that after the Council had approved these appointments, their power was exhausted and they could not, at any subsequent meeting, reconsider or rescind the action taken by them on June 18, 1917; and this is more emphatically true in view of the fact that the appointees have, in the meantime, duly qualified and have taken possession of and are now in the exercise of the duties of their offices.

Fortunately we find that it is wholly unnecessary for us to support the last mentioned proposition by any reasoning of our own. The legal authorities, with practical, if not absolute, unanimity, have definitely established such proposition as the law.

Some of the authorities above referred to are as follows:

In the great work of 28 Cyclopedia of Law and Procedure (which is a recognized authority) in the article on

Municipal Corporations, at page 341, the law is stated as follows:

“So, under a charter provision for the appointment of a city officer by the mayor, with the consent of the common council, who shall hold the office for two years, *the confirmation by the council of the mayor's appointment of such officer exhausts its power in the matter, and therefore it cannot reconsider its action therein.*”

In Volume 2 of McQuillin on Municipal Corporations, at Section 614, we find the following:

“A consideration of the acts of councils in electing and appointing or confirming the appointment or nomination of officers and agents will fully illustrate the difference between a completed and incomplected act or vote in regard to the right of reconsideration and rescission. Thus where the resignation of an officer was presented to the mayor to take effect at a future date, which resignation was accepted by the mayor and forwarded to the council which also accepted it, it was held that the act of acceptance of the resignation was complete and the council alone had no power to reconsider the action by which that body accepted the resignation. And in such case where the mayor, in accordance with the charter provisions nominated a successor and sent the nomination to the council which confirmed the appointment, *the council cannot at a subsequent meeting reconsider the vote by which the nomination was confirmed.*”

The case of *State ex rel. Calderwood v. Miller*, 57 Northeastern Reporter, 227, was a proceeding in *quo warranto* to oust the defendant from the office of city clerk. It was sought in that case to change the approval of the appointment of the clerk at a subsequent meeting. The Supreme Court of Ohio in holding that this could not be done, used the following language (57 N. E. Rep. 228-229):

“But the vote having been cast, and the result having been announced to the council by the clerk, by which it was apparent that the relator had received a plurality of the votes cast, the function of the council was discharged. *State v. Anderson*, 45 Ohio St. 196, 12 N. E. 656. The election was complete. The formality of a declaration by the presiding officer of the council could neither add to nor detract from the thing which

had already been done. The right of the relator to qualify and to be inducted into the office was fixed *eo instante*. *The council was engaged in the duty of electing officers—a duty imposed on the members thereof, not on the body as a council.* They were not engaged in the deliberative business which is the ordinary work of the council, but in the selection of a city officer. *They were not acting under parliamentary law, but were casting their votes and making their choice as required by a specific statute.* They could make this choice but once. Having done so, they could not reconsider it.”

The case of the *State of Minnesota ex rel. Henry W. Childs, Attorney-General v. Samuel F. Wadhams*, 64 Minn. 318, was a proceeding in *quo warranto* to oust the respondent from the office of city assessor of the City of Duluth. The claim was made that one or more aldermen by mistake voted to confirm the appointment, and at a subsequent meeting it was sought to reconsider and rescind the action of the council approving the appointment.

The Supreme Court of Minnesota, in holding that the Council had no such power said, beginning at the bottom of page 323 and continuing on 324 and 325 (64 Minnesota Reports):

“We now come to the consideration of the question as to whether the common council of the City of Duluth duly confirmed the appointment of the relator Hawkes as city assessor, or whether the confirmation was final or revocable.

“There is no pretense that the mayor did not exercise his right of appointment in strict accordance with the legislative authority. Before this appointment could become fully consummated and complete, it must, however, be sanctioned by the advice and consent of the common council. This appointment was submitted to the common council, and upon motion duly made and seconded it was confirmed by a vote of nine yeas in favor and six nays against it, and declared carried by the presiding officer, and so recorded by the clerk. Nine members constituted a majority of the common council. We find in the charter of the City of Duluth nothing more necessary to make this a consummated and complete appointment in every respect. The method appears to have been parliamentary and legal, and free from fraud or trickery. *It was the*

will of the people, fairly expressed through their legally constituted officials, and this will of the people once fairly exercised and consummated, should not be thwarted by subsequent considerations, unless fully sustained by a rational view of the law. We are of the opinion that the appointing power in this case was completely exercised, and that such power was irrevocable by the common council. The exact method for creating the relator city assessor had been complied with, and we think he was thereby as fairly entitled to the office as though he had been elected to it by ballot, at a regularly held election and that, this right having once been conferred upon him, he could not be deprived of it by any subsequent reconsideration of the vote whereby this appointment was duly confirmed.

“A public office is a public trust, and the incumbent has to some extent a property right in it, which he holds, not subject to barter and sale, but for the benefit of that political society of which he is a member. Of course, he is liable to be removed for cause, but it is not contended that the vote of confirmation was reconsidered or rescinded upon any ground which would constitute sufficient cause for removal, and, even if it had been upon such ground, the affirmative vote was insufficient, under the charter, for such purpose. It is to be observed that it is through these reconsideration proceedings of the common council, had at a subsequent meeting on March 30, 1896, that the relator's appointment is assailed. But before this time the appointment had been promulgated in addition to being duly declared and entered of record, and notice thereof publicly proclaimed. The law does not require any certificate of appointment to be given, nor does any commission issue in such case. *Everything necessary to constitute a finality, and perfect it, had been done, and, the power of the common council having been exhausted at the time of the confirmation of the appointment, it had no authority to reconsider it.* In support of these views see *State v. Phillips*, 79 Me. 506, 11 Atl. 274; *Whitney v. Van Buskirk*, 40 N. J. Law, 463. The allegation of mistake of Alderman Hanson in casting his vote, and his moving to reconsider, and his vote thereon, we regard as entirely immaterial and express no other views upon it.”

In the case of the *State of Maine v. Alanson M. Phillips*, 79 Maine, 506, it appeared that at a meeting held on March

15, 1887, the aldermen of the City of Ellsworth elected, pursuant to statute, Blaisdell as assessor. The meeting then took a recess until the next day, March 16, when on motion therefor it was voted to reconsider the election of Blaisdell and a new ballot was taken and Philips, the respondent, was elected. The court held that the aldermen could not reconsider their action of March 15, 1887, and that Blaisdell was entitled to the office.

The court, beginning on page 507, said:

“We think the rulings of the court below correct. The election of assessors was required to be by ballot. While a municipal body having the power of election may set aside a ballot by which it appears that an election is made, for some irregularity or illegality before the election is declared (*Baker v. Cushman*, 127 Mass. 105), we are aware of no authority which holds that, when the election by ballot is declared and entered of record, it may be reconsidered at an adjourned meeting on a subsequent day, and a new election had. When the aldermen balloted and declared the election of Blaisdell, and it was recorded, their power over the election to that office was exhausted unless he should decline to accept it. He did not decline to accept, and the aldermen could not deprive him of the office except by removal in the manner provided by law.”

The case of *People ex rel. Mosher v. Stowell*, 9 Abbott's New Cases, involved the office of city chamberlain. On March 11, 1879, Mosher was appointed by the Council. On March 14 the Council attempted to rescind the appointment of Mosher and to confirm the appointment of Stowell as chamberlain.

In holding that the Council had no power to do this the New York Supreme Court said on pages 458 and 459:

“In respect to the latter, his powers are discretionary; the former duty is absolute and imperative. When the Common Council adopted the resolution appointing the relator, its action in respect to the choice of a chamberlain was complete. It had no authority to rescind such action, especially after the relator had signified his acceptance of the office, by taking and filing the oath.”

The case of *In the Matter of Fitzgerald*, 88 App. Div. Rep., page 434, involved the office of clerk of the City of

Olean. The Appellate division of the Supreme Court of New York, beginning on page 439, used the following language:

“Two objections are urged by Keenan: *First*, that the resolution of March twentieth, in terms rescinding the resolution which had approved Fitzgerald’s appointment, was effective to recall the consent of the common council, and vitiate the appointment from the beginning, or that it was effective as an order removing him from office. *Second*, that even if such appointment and approval are valid and survived the rescinding resolution of March twentieth, that the appointee’s bond has never been approved by the common council, without which approval he is not entitled to take the office, or come into the possession of the books and papers appertaining to the office.

“The charter of the city of Olean (Laws of 1893, Chap. 478) provides that the office of clerk shall be an appointive office and that the term of such office shall be two years. (Sections 6, 7.) The mayor shall nominate, and with the consent of the common council, appoint all appointive officers. (Section 26.) ‘Any person elected or appointed to any office under this act, before entering upon the same, shall take the oath prescribed by the Constitution of this State, and file the same with the clerk of the city. The * * * clerk shall * * * also file a like oath with the clerk of the county of Cattaraugus. Every person so elected or appointed, who neglects for fifteen days after his election or appointment to give the bond or security required by law, or under the provisions of this act to take and file the oath of office, shall be deemed to have declined the office and it shall be vacant. * * * Every officer shall hold his term of office until his successor shall have been elected or appointed, and shall have qualified, unless his office has become vacant.’ (Sec. 14.)

“On March 2, 1903, Keenan’s term of office had long expired and the office was vacant for the purpose of a new appointment, and by Section 22 of the charter express power is given the mayor to fill the vacancy by appointment with the consent of the common council.

“It, therefore, appears that the appointment of Fitzgerald, made and confirmed March 2, 1903, was in all ways regular, and was followed by the filing of the oath and the giving of the bond required, within the fifteen days of his appointment. The giving of a bond is not made a condition precedent to his taking the office, but after March 9, 1903, Fitzgerald was the clerk and Keenan

was out. If Fitzgerald had failed to file his oath and bond for fifteen days, the office would, by the charter, become vacant, but Fitzgerald did file his bond on the eleventh of March. He had previously, and on March ninth, filed his oath. He had performed on his part every act which the charter required of him to indicate his acceptance of the office. The rescinding resolution was March twentieth. It could not have the effect of removing Fitzgerald from office if he was in. That was not its purport or intent; nor can it have that effect, even if the council have the power given by the charter to remove summarily without a hearing. The council probably had no such power. (See Sections 23, 24.)

"I think the council had no power by any resolution it might enact March twentieth to withdraw and annul the consent to this appointment, previously given on March second, nor could the mayor and council together, at that time, annul or recall that appointment and make it void from the beginning. By the charter the appointee holds for a definite term; he had been vested with the office, and if he was to be deprived of it it must be by removal in the manner provided by the charter.

"It was said in *Achley's case* (4 Abb. Pr. 37): 'The exercise of the power of appointment to office is a purely executive act, and when the authority conferred has been exercised it is final for the term of the appointee. * * * Laws or acts of the Legislature in the nature of laws are repealable at the will of the law maker, subject to the inhibition in the Constitution of the United States that no law shall be passed impairing the obligation of contracts. * * * no such power exists in reference to appointments to office. When the act is performed it is irrevocable.' (See also, *Marbury v. Madison*, 1 Cranch 137; *People ex rel. Mosher v. Stowell*, 9 Abb. N. C. 456.)"

The case of the *State ex rel. Burdick v. Tyrrel*, was an action to try the title to the office of city attorney of the City of Lake Geneva. The Supreme Court of Wisconsin, in 158 Wisconsin, in deciding the case, said, beginning at page 432:

"The contention of the appellant is that neither of these formal ballots elected the relator for several reasons, which will be considered. It is insisted that the proceedings show that the council understood that no selection of city attorney had been made. It may well be that the members of the council thought that the votes of three

aldermen under the circumstances did not elect, but what the aldermen did must control. The fact that the aldermen made a mistake of law in holding that the three votes cast for the relator did not elect him did not invalidate the election if three votes did in fact elect. *Nor did the other proceedings of the council respecting deferring action and voting to reconsider the election invalidate the election if relator was elected by the first formal ballot.* The proceeding to reconsider was not regular even if the council had power to reconsider. *The motion deferring action did not disturb the vote taken or change the choice of the three aldermen who voted for the relator, and the motion to reconsider was not passed upon until after the relator had filed his oath of office.*

“Moreover, after the election of relator, acceptance of the office, and qualification by him, the council had no power to reconsider and elect another. *State ex rel. Scofield v. Star*, 78 Conn. 636, 63 Atl. 512; *Regina ex rel. Acheson v. Donoghue*, 15 Up. Can. Q. B. 454; *Marbury v. Madison*, 1 Cranch 137; *State ex rel. Calderwood v. Miller*, 62 Ohio St. 436, 57 N. E. 227; 2 Dillon, Mun. Corp. 5th Ed., §529 and cases cited in note.

“In 2 Dillon, Mun. Corp. (5th Ed.) Sec. 529, it is said:

“‘The weight of authority is also to the effect that when a completed vote has been taken which results in the giving of the necessary majority or plurality to one of the candidates, the council cannot rescind its vote or reconsider its action and elect another person.’”

We have made an exhaustive search of the authorities bearing upon this question. We have found other decisions and authorities to the same effect as those above cited, but nothing to the contrary. It seems that the question has never arisen in Illinois, and hence there is no Illinois decision bearing directly upon the subject. But there can be no reasonable doubt that should the question arise in our courts they will follow the unanimous opinion of the authors and courts who have dealt with this proposition.

We therefore beg to advise you that it is your clear legal duty to rule that the City Council has no power to reconsider or rescind the action taken by them on June 18, 1917, and that if the City Council should attempt to do so their action

would be not only a mere idle ceremony but in direct violation of the law.

Respectfully submitted,

JAMES W. BREEN,
DANIEL A. ROBERTS,
CHESTER E. CLEVELAND,
Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Parking in Loop District.

June 22, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We are in receipt of your letter of the 13th inst., in which you request an opinion as to whether Section 2437a of The Chicago Code of 1911, passed by the City Council on March 12, 1917, has the effect of prohibiting vehicles from standing on streets in the loop district, in accordance with the provisions of that section, where such streets are occupied by street car tracks but street cars are not regularly operated thereon.

The section reads as follows:

“VEHICLES ON STREETS UPON WHICH STREET CARS ARE OPERATED.) No person, firm or corporation owning, controlling, driving or operating any vehicle propelled either by animal or other power, shall cause or permit such vehicle to stand on any public street or alley in the City of Chicago, upon which street cars are operated, within the district bounded on the north by the north line of Lake street, on the east by the east line of Wabash avenue, on the south by the south line of Van Buren street, and on the west by the west line of Market street, during the hours from seven o'clock a. m. to ten o'clock a. m., and from four o'clock p. m. to seven o'clock p. m., for a longer period at any one time than will be necessary for such vehicle to load or unload its occupants, baggage or merchandise.”

The section of the Code of 1911 which precedes Section 2437a, viz.: Section 2437, provides that no vehicle shall stand continuously in one place on any street within the loop district between the hours of 6 a. m. and 7 p. m., for a longer period than 30 minutes. Section 2437a places a limitation upon that section so that during the hours from 7 to 10 a. m. and from 4 to 7 p. m., vehicles are prohibited from standing on any street in that district, upon which street cars are operated, for a longer period at any one time than is necessary for such vehicle to load or unload.

The purpose of Section 2437a is obviously to place restrictions additional to those hitherto in force upon vehicles standing on streets in the loop district where congestion is enhanced by the operation of street cars during the specified hours of the morning and afternoon, when the use of the street is the heaviest. It is clear that additional restrictions were not intended to be placed upon vehicles standing in the streets of the loop district during those hours, except in the case of streets where street car tracks are laid and street cars are at some time or other operated.

These considerations seem to indicate that this section was intended only to apply to streets upon which cars are operated during the hours mentioned therein. The fact that tracks are present in a street is not alone sufficient to make the section applicable, and if those tracks are operated only at night, or at hours other than those specified, when congestion does not exist upon the street, we believe that the enforcement of the restrictions contained in this section would not be in harmony with the purpose for which the section was passed.

It is a well-settled principle of law that in construing statutes or ordinances effect will be given to the intention of the legislative body, where such intention can be discovered from the provisions of the law in question.

36 Cyclopedia of Law and Procedure, 1106.

Wabash, St. Louis and Pacific Ry. Co. v. Binkert,
106 Ill. 298, 306.

In view of the purpose for which Section 2437a was passed we are of the opinion that the words "are operated"

should be read, "are being operated during the hours herein mentioned." The extent to which street cars may be operated during the specified hours, however, on a street within the designated territory, we believe is not material. If cars are operated at all in such street during the hours mentioned, the section is applicable.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Payment of Warrants of the Board of Education.

June 29, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of the 25th instant, which reads as follows:

"There have been presented to this office for signature sundry warrants payable to the order of individuals, firms and corporations, for contract work and supplying material, etc. to the Board of Education.

"The vouchers originally bore the lithographic signatures of Jacob M. Loeb, president, and Lewis E. Larson, secretary. The vouchers as submitted to this office have the names of Jacob M. Loeb and Lewis E. Larson obliterated by rubber stamp and in their stead the warrants have stamped on their face the names of Edwin S. Davis, president, and Albert H. Miller, secretary.

"Shall these warrants be passed to payment? Please advise."

We entertain no doubt that these warrants should be passed by you to payment and that they should be honored and paid by the city treasurer.

Even if it were true, which we do not concede, that some ground existed for doubt as to whether or not the new Board of Education is strictly *de jure* the Board of Education of the City of Chicago, still the obvious fact is that such board is

in possession of the offices and exercising the functions of the Board of Education under the act of the Legislature approved April 20, 1917.

In any view this board is *de facto* such Board of Education and its acts, while in possession of the offices, are valid and binding, so far as third persons like yourself and the city treasurer are concerned.

In support of this proposition, we call your attention to the following authorities:

In *People v. Head*, 25 Ill. 287 (original edition page 325) our Supreme Court, beginning on page 290 used the following language:

“Upon receiving the certificate of election, and taking the oath of office, and giving bond, the relator was as much entitled to take possession of the office as he ever could be. There is no intimation in any part of the statute that such right shall be suspended by the notice of contest, or for any other cause, and his right must be held to be complete till it is superseded by another certificate, to be issued to his competitor by the county clerk upon the certificate of the tribunal before which the contest is tried. Who shall say without law that the party who possesses all the evidence of election and qualification which he can ever have, all that the law has authorized to be given in any case, is not entitled to, and shall not enjoy the office?

“In this case, it is true, the contestant is the old clerk, and in possession of the office, but such is not always the case. Suppose the old clerk had not been a candidate. Could he, when the relator presented himself with certificate of election, having taken the oath of office, and given the requisite bond, and demanded the records, etc., say to him that somebody who had been a candidate, was going to contest the election, and would, within the thirty days allowed by law, give him notice of a contest, or had already given such notice, and upon the mere suggestion that the demandant had not been legally elected, hold on to the office himself by force? He would have the same legal right to do it in that case as in this. If the course pursued in this case by the old clerk should be sustained, then every one elected to an office, no matter how fairly or legally, may be kept out of it during a contest, which by appeals and delays, may continue during

a considerable portion of the time, if not the whole period, for which he was elected. Such is not the law, as we understand it."

In *Burgess v. Davis*, 37 Ill. App. 353, the Appellate Court for this district, beginning on page 356, used the following language:

"The people are interested in having the duties of the office of county judge performed. Public policy requires the recognition, as an established principle, of the rule that an officer *de facto* may do legal acts, though *de jure* he has no title, and the same public policy will prevent a court of chancery from interfering to disturb the *de facto* officer in the receipt of the fees or the salary of the office. High on Injunctions, Secs. 1312, 1314; *Tappan v. Gray*, 9 Paige Ch. 506; *The People v. Albany & Susquehanna R. R.*, 57 N. Y. 161; *Buffalo v. Mackay*, 15 Hun 204; *Palmer v. Foley*, 45 How. Pr. R. 110; *Stone v. Witmore*, 42 Geo. 601."

In *School Directors v. Tingley*, 73 Ill. App. 471, a school teacher was employed by school directors who were declared elected, but whose election was contested, and in the end judgment was entered finding that such directors were not elected and ousting them from office. She sued for her salary, and it was contended she was not legally employed because the directors by whom she was employed were not lawfully elected. The court overruled this defense and on page 475 said:

"Appellant appeals to this court, and insists principally here that the judgment ought to be reversed, because inasmuch as the Supreme Court decided that Page and not Kuykendall was the legal director of said district, that appellee was not employed to teach by a majority of the directors of said district; but we think that the evidence fully establishes the fact that said Kuykendall was *de facto* school director of said district, from the date of the judgment of the County Court in June, 1895, to May 26, 1896, when the Supreme Court, on appeal from said judgment, decided that said Page was such school director; and while such *de facto* director, his acts as to third parties were binding upon appellant. We think appellee gave to appellant her services, after being employed by directors competent to bind appellant, and ought to be paid therefor."

In *Leach v. Cassidy*, 23 Ind. 449, the town auditor refused to draw a warrant in favor of a school trustee for school funds belonging to the town, on the ground that such school trustee was not legally elected. The school trustee instituted proceedings for a mandamus to compel such auditor to issue such warrant, and the writ was granted. The court, beginning on page 449, said:

“All the allegations of *Leach himself* show that *Cassidy* was trustee *de facto*. He was consequently entitled to perform all the duties and exercise all the powers of the office, until ousted by some one having a better right to it. The court below very properly refused to decide who was entitled to the office. An office is the right to exercise a public employment. The law has provided abundant means by which an officer *de jure* may become such *de facto*, against another person who wrongfully holds possession; but the public are interested that, while such litigation is pending to settle the right, the functions of the office shall continue to be exercised, in order that the public business may be done. To this end it is a rule of plain common sense, as well as of law, that the officer *de facto* shall act until he shall be ousted.

“Now, one of the most important duties of this office was to obtain the school moneys, in order that they might be used to keep the public schools of *Connersville* in operation. It would be a strange state of the law, which would close the doors of the schools, and turn the children into the streets, for a year or two, to await the settlement of the conflicting claims of *Cassidy* and *Leach* to the office of trustee. So, when it was made apparent to the court below that *Cassidy* was in possession of the office, it very properly compelled the auditor to recognize him as trustee. Having done that, its duty in that case was ended. *State v. Jones*, 19 Ind. 358.”

In *State v. Oates*, 86 Wisc. 634, 39 Am. State Rep. 912, the court, beginning on page 914 of 39 Am. State Rep., said:

“This *prima facie* right, if it means anything, must mean that the person having it has the right to the possession of the office and its books, papers, and other property when his term of office begins, if he has duly qualified. To this, we think, there is but one exception, and that is when the office is already filled by a *de facto* officer. There has been much discussion as to what will constitute a *de facto* officer. It is not material here to con-

sider who may be a *de facto* officer as to third persons and the public in general. The question is, who is a *de facto* officer, as against the person holding a certificate of election, who has duly qualified as required by law? On this question the law is well settled. A *de facto* officer is one who is in possession of an office, and discharging its duty under color of authority: McCrary on Elections, 3rd Ed., Sec. 218; 2 Dillon on Mun. Corp., Sec. 892. By color of authority is meant authority derived from an election or appointment, however, irregular or informal, so that the incumbent be not a mere volunteer; McCrary on Elections, Sec. 218."

Furthermore, there is not, in our opinion, any fair or reasonable ground for doubt that this new board is the *de jure* Board of Education of the City of Chicago under said act of April 20, 1917.

In support of this proposition, see our opinion addressed to the mayor, dated June 22, 1917, and appearing at pages 682 to 686, both inclusive, of the Council Proceedings of that date.

The truth is that there is an additional reason for honoring the warrants now under consideration that did not exist at the time when the warrants to the teachers, which were recently honored, were honored, viz.: That since the warrants in favor of the teachers were honored an information in the nature of a *quo warranto* has been filed by the people on the relation of the old school board against the new school board. This proceeding recognizes that the new school board is in possession of and exercising the functions of the office of the Board of Education of the City of Chicago.

The statute allows an information in the nature of a *quo warranto* to be filed only against some person who shall "usurp, intrude into, or unlawfully hold or execute any office or franchise"; in other words, such information can be filed only against some one who is in possession of an office. It cannot be filed against a person who is not in possession.

People ex rel. Koerner v. Ridgley, 21 Ill. 64, 67;

People ex rel. Shallberg v. Central Union Telephone Co., 232 Ill. 260, 271-2.

In consideration of the foregoing, we believe that it would be an arbitrary exercise of power, in plain violation of the law, for you to refuse to pass these warrants to payment and for the city treasurer to refuse to honor and pay the same.

Very truly yurs,
LEON HORNSTEIN,
CHESTER E. CLEVELAND,
Assistants Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Procedure for Removal of Boiler.

June 29, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter dated May 11, 1917, in which you ask us to indicate the procedure which may be followed to cause the removal of a boiler located in a vault maintained by Martin Dawson, under the alley adjoining the latter's building at 1520-22 South State street.

Permission to construct the vault in question was given by the city in an ordinance passed January 3, 1894. (Council Journal of that date, page 1436). It is well settled that a city may allow any use of its streets which is not inconsistent with their use by the public, and in the exercise of that power may permit the construction of vaults underneath such streets for private purposes, provided such vaults do not interfere with their public use.

The title to the alley in question is in the City of Chicago under a warranty deed executed by Charles Hitchcock, dated September 29, 1869, recorded May 10, 1870. The courts have held that where this situation prevails, the city may terminate its permission to maintain a vault underneath a public street at any time when the public convenience or necessity so requires.

The People v. Field & Co., 266 Ill. 609, 623.

Tacoma Safety Deposit Co. v. Chicago, 247 Ill., 192, 200.

While this ordinance authorizing the construction of the vault in question did not specify that it might be used as a boiler room, we understand that it has been so used for many years. Such a use of the vault is not *per se* illegal. So far as appears, it was intended that the vault should be used for any lawful purposes.

In *Gregsten v. City of Chicago*, 145 Ill. 451, and *City of Chicago v. Norton Milling Co.*, 196. Ill. 580, vaults constructed under public streets pursuant to authority received from the city, were used as boiler rooms, and no objections to the legality of that action appears to have been suggested. The boiler is subject to inspection by the Department for the Inspection of Steam Boilers and Steam Plants of the city, and if it is defective and dangerous to life that department has authority to take its customary action to safeguard the interests of the public.

We are, therefore, of the opinion that it would be improper for the commissioner of public works to take any summary action with a view to the removal of the boiler under consideration at this time. In case the council determines that the grade of the alley where the vault is located should be lowered, and consequently terminates the authority previously given to maintain the vault, the situation would be materially altered and steps could then be taken to cause the boiler's removal.

Yours very truly,
RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Salary of Reinstated Civil Service Employee.

July 2, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

The communication of April 2, 1917, from L. E. Gosselin, deputy comptroller, to this department, relative to one Law-

rence Phillips, a messenger employed in your office, who was suspended from duty on February 21, 1917, pending the hearing of charges before the Civil Service Commission, has been referred to me for reply.

It appears from the Civil Service records that after the hearing of said charges, said matter was taken under advisement by the Civil Service Commission on March 16, 1917, and on March 23, 1917, the case was dismissed by the Commission and Phillips was reinstated in his position on March 24, 1917.

The foregoing, taken from the records of the Commission, shows that Phillips was actually out for a period of thirty-one days. He, of course, could be permanently removed only in accordance with Section 12 of the Civil Service Act.

In regard to suspension, Section 1 of Rule 7 of the Civil Service Rules provides as follows:

“For disciplinary purposes, heads of departments shall have power to suspend officers or employes for reasonable periods, not exceeding thirty days. The commission may investigate any such suspension.”

The suspension in this case was not, as we understand it, “for disciplinary purposes,” but for the purpose of removing Phillips from his position pending the hearing of charges, which were later filed on March 5, 1917. The charges were heard by the Commission, and the case was taken under advisement on March 16th, which operated to continue in force his suspension until the matter was disposed of by the Commission. This Commission, having dismissed the case on March 23, 1917, for what reason does not appear, but in the absence of a finding must be presumed to have been because the evidence failed to sustain the charges, Phillips was thereupon reinstated to his position on March 24, 1917.

As to the right to salary covering the period of time that he was out, we desire to call attention to the case of *City of Chicago v. Luthardt*, 191 Ill. 516, wherein the court held that the legal right to an office carried with it the right to the salary or emoluments of such office; that the officer can recover compensation for the period of time he is prevented

from performing the duties of his office unless the compensation has been paid to a *de facto* officer performing such duties in his absence.

We are, therefore, of the opinion that Mr. Phillips is entitled to his salary in the instant case for the entire period of time from the date of his suspension to the date of his reinstatement.

Yours very truly,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Notice to Aldermen of Application for Slaughtering and Rendering License.

June 30, 1917.

HON. JAMES T. IGOE, City Clerk.

Dear Sir:

We have your letter of June 29th, asking whether it is necessary for the city clerk to advise aldermen of the application for slaughtering and rendering license in a case where a new firm takes over the business at the stand used for this purpose and theretofore licensed.

Section 1329 of The Chicago Code of 1911, as amended by ordinance passed December 13, 1916, provides, in part, as follows:

“Provided, however, that thirty days before any such license is issued *to a new applicant to start in the aforesaid business* there shall be mailed by the city clerk a notice of such application to the aldermen representing the ward in which the applicant *intends to carry on such business*, and to the aldermen whose wards or any part thereof are within a radius of three miles of the proposed location where application is made to carry on such business.”

Before its amendment, said part read as follows:

“Provided, however, that thirty days before any such license is issued there shall be mailed by the city

clerk a notice of such application to the aldermen representing the ward in which the applicant is carrying on such business, or is about to carry on the same, and to the aldermen whose wards or any part thereof are within a radius of three miles of the present or proposed location where application is made to carry on such business."

A comparison of the original and the amended parts discloses that the words "*to a new applicant to start in the aforesaid business*" and the words "*intends to carry on such business*" were inserted, and the words "*is carrying on such business or is about to carry on the same*" were taken out of the ordinance.

Ordinances are construed in the same manner as statutes. A statute should be construed so as to give effect to the main intent, and in determining its meaning the court will have regard to existing circumstances or contemporaneous conditions and will also look to the objects sought to be obtained by the act and the necessity for its adoption. *People ex rel. Krause v. Carter H. Harrison*, 191 Ill. 257. And so the courts have held that a thing which is within the letter of a statute is not within the statute unless it be within the intention of its makers. In determining the meaning of a statute, the courts are not confined to its words but will regard its purpose and consider it in connection with other statutes, *in pari materia*, and in view of the condition existing. *James O. Anderson v. C. B. & Q. R. R. Co.*, 117 Ill. 26.

In an opinion by Leon Hornstein, assistant corporation counsel, and approved by acting corporation counsel, rendered April 19, 1915, referring to the ordinance before it was amended, the following appears:

"Thus in Section 1329, where the provision for notice to the aldermen of the ward appears, there are two places where it is made plain that the provision is intended to apply to plants already in existence as well as to those about to be established, and it follows that in the absence of such precise language in the other parts of the ordinance we have another indication of the intention of the law-making body."

Thereafter the ordinance was amended as above indicated and, in order to properly construe it, we must examine both

the words used and consider the objects sought to be accomplished by the changes made.

The word "start" is defined in the Century Dictionary as "to originate"; in Words & Phrases, p. 6628, and also in Bouvier, p. 1029, as "the commencement of the enterprise or undertaking." (Citing *Graw v. Manning*, 54 Ia. 719.) "Start" has also been held to mean "to give an initial impulse or movement; first motion from a place." *Knuckey v. Butte Electric Railway Co.*, 109 Pac. 979, 981. In this ordinance, therefore, "start" must be held to apply only to new businesses. This interpretation is further fortified by the fact that the words "is carrying on such business" contained in the original ordinance were eliminated.

It is apparent that the object of amending the old ordinance was to provide for notification to the aldermen of the ward where a new slaughtering or rendering house was to be established, in order that they might take such action as in their judgment would most effectively preserve the rights of their constituents.

It can be no material concern of the aldermen whether one person or another continues to conduct an established plant, and our conclusion, therefore, is that it is the plain intent of this ordinance as amended to require such notice only in the case where a license is sought for a place about to be established, and not theretofore used for slaughtering or rendering purposes, and that where a new firm takes over the business or plant at a stand used for this purpose, and theretofore licensed, such notification is not necessary.

Yours very truly,

FRANK S. RIGHEIMER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Detail of Motorcycle Policemen Beyond City Limits.

July 3, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of
Police.

Dear Sir:

We are in receipt of your letter of today, reading as follows:

"I would respectfully ask that you render me an opinion on a matter where request has been made that I detail some motorcycle policemen to aid in the enforcement of the law on Milwaukee avenue, outside of the city limits, where there is a great deal of speeding. I would like to know whether I have the right to take these men who are paid by the taxpayers of the City of Chicago and detail them to this work outside of the city."

We cannot prepare an opinion which we would want to stand as a permanent opinion in the limited time at our command, inasmuch as you have informed us that you want an opinion for your guidance tomorrow. Therefore, we will state our conclusions and some of the reasons and authorities in support thereof in a somewhat rambling way, reserving the right to withdraw this opinion and supply another in place of it which will be more perfect in form.

It is our opinion that Chicago policemen cannot be assigned to police duty outside of the city limits in the manner indicated by your letter.

We have in mind the statute entitled, "An Act to define police districts and the powers and duties of the police therein," Hurd's Revised Statutes 1915-16, page 378, paragraphs 251, 252, which makes it lawful for the police of any city, village or incorporated town to make arrests in the police district which is composed of the territory embraced within the limits of adjoining cities, villages and incorporated towns within any county in the state; but our information is that these motorcycle policemen are expected to do duty outside and beyond the limits of any such adjoining city, village or incorporated town, and so we do not believe that the statute referred to applies to the situation that is presented.

By paragraph 83 of Chapter 24 of Hurd's Revised Statutes of 1915-16, page 312, it is, among other things, provided:

"All warrants for the violation of ordinances, and all criminal warrants to whomsoever directed, may be served and executed *within the corporate limits of any such city* or village by any policeman of *such city or village*, such policeman being hereby clothed with all the common law and statutory power of constables for such purpose."

We do not think that a policeman would be authorized to make arrests without warrants in any other territory than that in which he is authorized to make arrests with warrants.

The Chicago ordinances relating to police provide (Section 1914 of the Code of 1911) that the general superintendent of police shall devote his whole time to the municipal affairs of the city, to preserve the peace, order, safety and cleanliness thereof, etc.; and there is a further provision (Section 1937 of the Code of 1911) that—

"the several members of the police force of the city when on duty shall devote their time and attention to the discharge of the duties of their stations according to the laws and ordinances of the city and the rules and regulations of the department to preserve order, peace and quiet and enforce *the laws and ordinances throughout the city*," etc.

This language we think, precludes the idea that they would be expected to do duty outside the city.

Under date of October 13, 1914, Assistant Corporation Counsel Ganey, in an opinion approved by Corporation Counsel John W. Beckwith, gave an opinion to James Gleason, general superintendent of police, which contains the following paragraph:

"We beg to advise you that the Lincoln Park and South Park Commissioners are two separate and distinct corporations organized under the State of Illinois, and that the territory of Lincoln Park is not in anywise under the jurisdiction nor is it part of the City of Chicago. This is also true of the South Park territory. The policemen in both instances are officers of the two corporations and are not officers or policemen of the City

of Chicago. They have no jurisdiction outside the boundaries of the park systems to make an arrest, but must call a policeman of the City of Chicago, and are in the same position as the policemen of the City of Chicago would be if they attempted to make an arrest in the City of Evanston."

Perhaps the writer of this last opinion did not attach enough importance to the statute constituting adjoining towns and cities police districts, which statute we have above referred to.

On January 28, 1914, William J. Naughton, assistant corporation counsel, in an opinion approved by Corporation Counsel William H. Sexton, rendered an opinion to the Honorable James Gleason, general superintendent of police, that the City of Chicago did not have power to furnish police for the Ridge Park District, and he concludes as follows:

"But it must be apparent from all the foregoing that our City Council not only did not have the power, but also that it was not its intention to attempt to authorize the appointment of police officers for and to act within the jurisdiction of another municipal corporation having within itself full power of appointment."

We merely mention these opinions without expressing concurrence or lack of concurrence in all of their conclusions at the present time.

The law is laid down by the books generally, that sheriffs, constables and like officers, except so far as specifically authorized, cannot exercise their powers outside the territorial limits of the county for which they are appointed.

In the case of *Marton v. Houcks*, 7 L. R. A. (n. s.) 576, the Supreme Court of North Carolina said on page 578:

"A police officer was not known to the common law, and therefore he can exercise only such powers as are given by the statute. His right to arrest when he has no warrant is confined necessarily by the statute to the limits of the town (citing authorities), so that Houck cannot justify the arrest of the plaintiff as an officer, for he did not arrest in the town and had no warrant and his co-defendants consequently cannot justify under him."

In a note to the case of *Leger v. Warran*, 51 L. R. A. 193, at page 214, we find the following:

“In the absence of statutory authority conferring power upon a sheriff, constable, or policeman to act outside of the county, town, or city to which he belongs, such officer will be liable in false imprisonment for making an arrest out of his jurisdiction. *Butolph v. Blust*, 41 How. Pr. 481; *Lawson v. Buzines*, 3 Harr. (Del.) 416; *Krug v. Ward*, 77 Ill. 603; *Kindred v. Stitt*, 51 Ill. 401; *Page v. Staples*, 13 R. I. 306; *Spencer v. Moore*, 19 N. C. (2 Dev. & B. L.) 264; *Moak v. De Forrest*, 5 Hill. 605.”

The case of *State ex rel. v. Stobie*, 194 Mo. 14, is a very long case, but at page 61 we find the following in the opinion:

“It may be said that these two local governments, situated as they are, created the necessity for a law extending the jurisdiction of the police system of the City of St. Louis to the County of St. Louis. This by no means can warrant or furnish a justification to this court, in order to meet a condition complained of, to treat a law as existing, when in fact none exists.

“While the metropolitan police system was created by the state through its General Assembly, it was created for the city. The City and County of St. Louis, by the express provisions of the Scheme and Charter, were made separate, distinct and independent municipalities, and unless we are to absolutely ignore all the principles of local self-government, which have never been deprived by this great commonwealth, it must be held under the law now in force that as police officers, relators were without authority to arrest offenders in St. Louis County for offenses committed in such county.”

From the foregoing as above stated, we are of the opinion that you have no right to assign motorcycle policemen to aid in the enforcement of the speed laws on Milwaukee avenue outside of the city limits and especially outside of the limits of Niles, which is the only city, town or village within the county which adjoins the City of Chicago.

As before indicated, this opinion is put together hurriedly, and while we entertain no doubt as to the soundness of the conclusion reached, we desire to have an opportunity to revise it and perhaps cite additional authorities.

Very truly yours,

CHESTER E. CLEVELAND,

Approved: *First Assistant Corporation Counsel.*

SAMUEL A. ETTTELSON,

Corporation Counsel.

Employment Certificates for Children.

July 5, 1917.

HON. JOHN D. SHOOP, Superintendent of Schools, Tribune Building, Chicago, Ill.

Dear Sir:

We are in receipt of your request for an interpretation of an act of the General Assembly of the State of Illinois entitled "An Act concerning child labor," approved and in force July 1, 1917, in so far as said act regulates the issuance of employment certificates to children between the ages of 14 and 16 years.

In reply, we beg to advise you that Section 4 of the said act expressly provides that an employment certificate shall be issued only by the superintendent of schools or by a person authorized by him in writing, or, where there is no superintendent of schools, by a person authorized by the school board or other local school authority. The act further provides that before the issuance of an employment certificate, the school record required by the act shall be filled out and signed by the principal of the school—public, private or parochial—which the minor has last attended, and that no employment certificate shall issue until the official authorized to issue an employment certificate has received, examined and approved the same.

From an examination of the entire statute it is quite clear to us that under its provisions the superintendent of schools is clothed with complete and exclusive authority to receive applications for employment certificates from pupils in all schools,—public, private or parochial—within the City of Chicago, and that the superintendent is also authorized, upon his approval of the applications for labor certificates furnished him in accordance with the statute, to issue or cause to be issued employment certificates.

We also beg to advise you that the act concerning child labor, approved and in force July 1, 1917, specifies in Section 5 the papers necessary for applicants for employment certificates to present to you for your approval, and sets out in full the form to be used for establishing the school record of the

applicant, and also contains the form of employment certificate required by the act. Under this new act the principals or heads of private or parochial schools have no power to issue labor certificates. The statute imposes upon them the duty of furnishing you with the school record of pupils between the ages of 14 and 16 years who desire labor certificates, and when that is presented to you, together with a certificate of physical fitness, proof of age, and statement signed by the prospective employer or by some one duly authorized in his behalf, stating that he expects to give such minor present employment, and setting forth the character of the same, the number of hours per day and the days per week said minor shall be employed, then if the facts detailed in the above named documents receive your approval you are authorized to issue labor certificates.

We would respectfully suggest that all forms used by you in the issuance of labor certificates comply with the requirements of the statute. Under the provisions of the statute all labor certificates issued by you belong to the Board of Education, and they are to be returned to your office within three days after the minor to whom they are issued leaves the service of the employer holding the same.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Right of James S. Kirk & Co. to Maintain Switch Track
in Street.**

July 25, 1917.

HON. WM. HALE THOMPSON, Mayor, Chicago, Illinois.

Dear Sir:

We are in receipt of your request for an opinion as to your power to terminate certain concessions and privileges granted to James S. Kirk & Company by the City of Chicago, together with your request for us to ascertain what, if any,

privileges have been granted to James S. Kirk & Company in the immediate vicinity of where North Water street is intersected by Rush street.

In reply we beg to advise you that on June 3, 1907 (Council Proceedings, p. 467), an ordinance was passed granting permission and authority to James S. Kirk & Company to maintain and operate a single railroad switch track connecting with the tracks of the Chicago & Northwestern Railway Company in North Water street at a point about 150 feet northeast of Block 7 in Kinzie's Addition to Chicago, and running in a southwesterly direction along the northerly side of North Water street for a distance of about 350 feet to the east line of Pine street.

The same ordinance contained a provision granting permission and authority to the said company to construct, maintain and operate one single switch track connecting with the switch track above described at a point about 75 feet east of Block 7 in Kinzie's Addition to Chicago, and running in a westerly direction along the south side of Michigan street for about 300 feet to the east line of Pine street. Section 2 of this ordinance provides as follows:

"The permission and authority herein granted shall cease and determine ten (10) years from and after the date of the passage of this ordinance, or at any time prior thereto in the discretion of the Mayor, whereupon this ordinance shall become null and void. This ordinance shall be subject to modification, amendment or repeal at any time, and in case of repeal all privileges hereby granted shall thereupon cease and determine."

The foregoing ordinance has expired and an ordinance renewing the privileges was introduced in the City Council on March 26, 1917. (Council Proceedings, p. 4025.) This ordinance was placed on file on May 21, 1917, by the City Council.

We are informed that James S. Kirk & Company are still maintaining and operating both of the above mentioned switch tracks, and in doing so they are operating same in the absence of any authority whatever from the City of Chicago. It is our opinion that since the expiration of the rights

granted to James S. Kirk & Company under the ordinance passed June 3, 1907, that the use of the said switch tracks by this company is in violation of the law and that the use by them may at any time be terminated by the city officials.

On March 23, 1908 (Council Proceedings, p. 4637), the City Council passed an ordinance granting permission and authority to James S. Kirk & Company, a corporation, its successors and assigns, to maintain and operate a subway or tunnel under and across North Water street east of Pine street, the said tunnel to be used for the sole purpose of conveying coal, ashes and cinders to and from the premises of the said company. Section 4 of this ordinance provides:

“The rights and privileges hereby granted shall cease and determine ten (10) years after the date of the passage of this ordinance, or at any time prior thereto in the discretion of the mayor. This ordinance at any time before the expiration thereof shall be subject to modification, amendment or repeal, and in case of repeal all privileges hereby granted shall cease and determine.”

On March 22, 1915 (Council Proceedings, p. 4076), the City Council passed an ordinance granting permission and authority to James S. Kirk & Company to install, maintain and use a twelve-inch tile conduit under and across Pine street between Austin avenue and North Water street, said conduit to contain one four-inch pipe, one two-inch pipe and two one and one-half inch pipes for the purpose of conveying oil between the premises of the grantee, situated on both sides of Pine street between Austin avenue and North Water street. Section 2 of this ordinance provides as follows:

“The permission and authority herein granted shall cease and determine ten (10) years from and after the date of January 22, 1915, or may be revoked at any time prior thereto by the mayor in his discretion without the consent of the grantee herein named. This ordinance shall also be subject to amendment, modification or repeal at any time without the consent of the grantee, and in case of such repeal all the privileges herein granted shall thereupon cease and determine. In the event of the termination, revocation, amendment or modification of the authority or privileges herein granted, by lapse of time, the exercise of the mayor's discretion, or the exercise

by the City Council of the powers above reserved, the grantee, by the filing of the written acceptance herein-after provided for, shall be understood as consenting that the city shall retain all money it shall have previously received under the provisions of this ordinance from said grantee, said money to be considered and treated as compensation for the authority, permission and privileges enjoyed from the date of the passage of this ordinance until such action by the mayor or City Council as the case may be."

In addition to the above privileges granted by the city to James S. Kirk & Company, the said company were also given authority to maintain and operate a scale in North Water street under contract No. 107, entered into by virtue of a permit issued under a general ordinance regulating the erection, location, construction and maintenance of scales in any street, alley or other public place in the City of Chicago, which ordinance was passed on July 28, 1913, for a period of time ending June 30, 1919, at an annual cost of \$25. Section 5 of this last mentioned ordinance provides as follows:

"Permits required by this ordinance shall contain provisions providing that the same is issued in consideration of the payment of the fees as required in Section three (3) hereof; that default in payment of the compensation required or revocation by the mayor or the City Council, which revocation may be made at any time without the consent of the grantee, shall terminate the authority and privileges granted; that in the event of the termination or revocation of the authority and privileges granted, the grantee by acceptance of the permit consents that the city shall retain all money it shall have previously received from said grantee under the permit, said money to be treated and considered as compensation for the authority, permission and privileges enjoyed from the date of the issuance of said permit until its termination or revocation; that in case the authority and privileges are terminated or revoked, said grantee shall remove said scale without cost or expense of any kind whatsoever to the City of Chicago; provided, that in the event of the failure, neglect or refusal on the part of said grantee to remove said scales when directed so to do, the City of Chicago may proceed to remove same and charge the expenses thereof to said grantee."

In conclusion, we beg to advise you that under the ordinances power is conferred upon you to terminate any of the foregoing concessions granted to James S. Kirk & Company by the City Council, whenever in the exercise of your discretion you may determine that the best interests of the City of Chicago may be served by a termination of said privileges.

With regard to the switch tracks hereinbefore referred to: The use of same may be summarily prohibited at any time, as the ordinance under which they were granted authority to maintain and operate same has expired by limitation and the City Council has not seen fit to grant a renewal of the same.

Yours very respectfully,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Meaning of Term "Regular Employees."

July 26, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your favor of July 14th, requesting us to advise you as to who are to be considered "regular employees" in interpreting the following order passed by the City Council on June 29, 1917:

"WHEREAS, A number of employees in the city service are now members of the regular army, navy, marine corps, national guard or other military and naval forces of the United States and more of such employees will become such members at various periods during the remainder of the year 1917, therefore, be it

"ORDERED, (1) That the positions of those regular employees in the military or naval service of the United States or who have now entered or shall hereafter enter such service during the balance of the year 1917 shall be kept open during the remainder of said year or until their prior return to the city service and that in so far as possible the duties of the city employees so absent shall be performed by other employees of the department, bu-

reau or division to which such absent employes have been assigned.

“(2) That no position of a regular employe of the city so in the military service of the United States during the balance of the year 1917 shall be filled temporarily or otherwise except upon the written request of the head of his department approved by a sub-committee of the committee on finance of which the chairman of said committee shall be a member. In no event shall the compensation of such temporary employe exceed that set up in the 1917 appropriation for the position so temporarily filled.

“(3) That all employes in the military service of the United States as aforesaid shall be paid by the City of Chicago for the period during the year 1917 that they are in such service an amount, which together with the pay received from the United States government will equal the 1917 appropriation for their respective positions, provided that where the government rate of pay for such employes equals or exceeds the wage or salary provided in the 1917 appropriation bill such employes shall receive no pay from the City of Chicago.

“(4) That the names of such employes be entered upon the appropriate payrolls for such payroll period and that the salary and wages coming to such employes be paid to such persons as the employes may in writing direct.”

We conclude from your communication and our oral conversation with attaches of your office that you desire, in addition to the foregoing request, an opinion from us as to the manner in which you should adjust the salaries or wages of the persons in the employ of the city who are now or who may hereafter become members of the regular army, navy, marine corps, national guard or other military or naval forces of the United States.

To arrive at a proper construction of this order, it is necessary for us to ascertain and determine what the intention of the City Council was in adopting same.

In reply, we beg to advise you that from a reading of the entire order it is apparent to us that the City Council in adopting same intended to provide for the dependents of city employes who had entered, as well as those who may enter, the

military or naval service of the United States during the remainder of the year 1917.

As to your inquiry as to who are the "regular employes" within the meaning of the above order, we are of the opinion that the phrase "regular employes" as used in the said order, together with the entire order, should receive a liberal construction in order to comply with the spirit of the order and the intention of the City Council. When the council used the words "regular employes" it intended to include all persons working for the City of Chicago at the time of their entry into the military or naval service of the United States. This construction will include within the scope of the order all employes of the city who have joined prior to the passage of the order, or who may join the military or naval service of the United States at any time during the remainder of the year 1917.

In determining what amount of money to be paid to said employes, we beg to advise you that you will not experience any difficulty in determining the amount of money to be paid said employes whose compensation is fixed at an annual rate in the appropriation ordinance. In paying such employes you should ascertain immediately what amount of compensation they are receiving from the Federal government for their services, and upon receipt of same deduct said amount from the amount that they receive monthly from the City of Chicago and remit to the employe the remainder.

It is a little more difficult to determine how to apply the provisions of the above order to those employes of the city who are now or who may during the remainder of the year 1917 become engaged in the military or naval services of the United States, and who, prior to their entry into such service, were paid by the city at a specified amount per day or hour and who did not work full time. In our opinion the City Council in passing this order desired to so adjust the wage scale of employes of this class that their dependents might not suffer any financial loss during the time the employes were engaged in the service for their country.

It is our opinion that the spirit of the order can best be complied with by permitting these absent employes to draw

monthly or semi-monthly on the basis of the maximum amount paid to any employe in the particular grade within the department in which the position is classified. This, we believe, is the most equitable and just manner of dealing with such a difficult problem.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Assignment of Judgment Against City.

July 31, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We acknowledge receipt of your communication of July 12th wherein you ask our opinion as to whether or not you should require the attorney of record to obtain an assignment or power of attorney from the owner of a judgment before making payment to such attorney of a judgment rendered against the city in favor of his client.

In the case of *Custer v. Agnew*, 83 Ill. 194, the Supreme Court said that:

“The attorney of record for the party in whose favor judgment is rendered, has full authority growing out of this relation to collect the money and give acquittance therefor, either to the judgment debtor or the sheriff. The judgment creditor undoubtedly has the right to discharge his attorneys at any time and revoke the authority to collect; and money paid over to such attorney after his power to receive is revoked, by any one having notice that the power is revoked, must undoubtedly be regarded as paid of his own wrong, and can be recovered by the plaintiff from the party so wrongfully paying the same to such attorney.”

It is apparent from the foregoing that the courts base the right of attorneys of record to collect and satisfy judgments on behalf of clients whom they represented as de-

pendent on whether or not their authority to collect has been revoked.

And in the final analysis the question "whether an attorney of record in a case has the authority to execute a satisfaction of judgment on behalf of a client whom he represented in the trial of a case," resolves itself into a question of fact. It is our opinion, therefore, that the safe course for your office to pursue in these matters is to require all attorneys requesting payment of judgments to show authority from their clients before any payments are made to them.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Vacation of Streets and Alleys.

August 10, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

On July 6, 1917 (Council Proceedings, pp. 1035-6) the City Council passed an ordinance vacating parts of certain alleys described as:

"The south one hundred and three (103) feet more or less of the north and south public alley and all of the east and west public alley in the block bounded by West Thirty-ninth street, West Fortieth street, South Dearborn street and Federal street."

One of the express conditions upon which such vacation was made was that George H. Shank should, within sixty days after the passage of the ordinance making such vacation, pay to the City of Chicago the sum of \$1,210 towards a fund for the payment and satisfaction of any and all claims for damages which may arise from the vacation of said parts of said alleys.

The ordinance is in the regular form which has been in use since long prior to the beginning of your administration

in cases where an alley is vacated in fact in the interest of a private person in consideration of compensation paid by such person to the city.

But the Supreme Court of the state on June 21, 1917, in the case of *Lockwood & Strickland Company v. City of Chicago*, handed down an opinion holding that the money paid to the city under such an ordinance as is here involved is held by the city merely as indemnity against claims for damages against the city on account of such vacation, and if there are no such claims for damages presented within five years the city must return the money so received by it to the person who pays the same in order to procure the vacation of the alley.

The Supreme Court on the subject of the city's vacating alleys in the interest of private persons for compensation paid to the city therefor used the following language:

"We are not impressed by the argument that the public interest was served by the receipt in the city treasury of the sum of \$2,694 for its action in vacating the alley. Whether the alley was no longer needed for public use and whether the public interest would be subserved by its vacation could not be made to depend on how much the city could get for its action. The legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It would be a novel proposition to hold that a city, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy."

We are, by petition for rehearing, asking the Supreme Court to change its above mentioned decision; and, failing in that, we have in mind to try to have set aside the vacation of alleys where the persons in whose interest the vacations were made seek to recover from the city the money paid by them as compensation for such vacation.

In the case before us Mr. Shank, in whose interest the alley was vacated, is urging that you sign this ordinance.

We submit for your consideration whether the City Council would have passed this ordinance if they had understood that at the end of five years the city would have to repay Mr. Shank the \$1,210 which the ordinance provides he is to pay to the city as a condition upon which the alleys would be vacated? Or did the City Council understand that such \$1,210 was to be paid to the city as compensation to be kept and used by it as a part of its revenue?

It seems to us there is reason to believe that the Council, in passing this ordinance, acted under a misapprehension, and that before you sign the same it would be proper to call the Council's attention to the facts above stated.

Yours very respectfully,

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Liability of City on Claim of John J. Brittain.

August 9, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter dated August 3d, with enclosure of claim of the John J. Brittain Company for the cleaning of Ward Building No. 3 of the Contagious Disease Hospital, in which you request an opinion as to the city's liability upon said claim.

Section 2102 of The Chicago Code of 1911 provides as follows:

“2102. CONTRACT—EXTRA WORK.) Where any work or job is done or is being done for the city under contract, no payment shall be made on such contract for any work not specified in such contract, and no money shall be paid beyond the prices specified in such contract for any work, labor or material necessary for, or used in, completing the work provided for by such contract.

“Where any contract is entered into on behalf of the city with any person, firm or corporation for the doing of any work or job, no extra work upon the undertaking or job authorized in such contract shall be ordered or authorized to be done by the commissioner of

public works, or by any officer or agent of the city, which will involve the expenditure of any money over and above the amount specified and fixed as the contract price in and by such contract, unless the express authority of the City Council be first procured for such extra work and for the expenditure of the amount to be paid therefor.

"In any case where work is done under contract with the city under the supervision of the commissioner of public works and it shall be the opinion of the said commissioner that in order to properly complete such work, extra work not provided for in such contract will have to be done, or additional expenditures not provided for in such contract will have to be made, said commissioner shall submit a report in writing to the City Council, setting forth fully what extra work is desired, the necessity therefor and the amount of money necessary to be expended in and about such extra work."

Pursuant to this ordinance there was embodied in the contract entered into by and between the City of Chicago and the John J. Brittain Company for the construction of the building in question provisions which required the authorization of the City Council before any extra work should be done under said contract requiring additional expense.

Paragraph 116 (a) of Chapter 24, Article IX, Hurd's Revised Statutes, provides:

"Any work or other public improvement except any work or public improvement to be paid for in whole or in part by a special assessment shall, when the expense thereof shall exceed \$500, either be constructed by contract let to the lowest responsible bidder in the manner prescribed by ordinance (*Provided, however, any such contract may be entered into by the proper officers without advertising for bids, by a vote of two-thirds of all the aldermen or trustees elected;*) * * *."

The foregoing provisions of the statute and ordinance, as well as the provisions of the contract itself, effectually preclude any legal claim arising against the city on account of the work for which the John J. Brittain Company is now seeking compensation. It is well settled that where there is an ordinance or statute prescribing the method by which an officer or agent of a municipal corporation may bind the municipality by contract, that method must be followed, and that where the provisions of the ordinance or statute are not fol-

lowed no implied liability will result from the performance of work on behalf of the municipality.

In *Roemheld v. City of Chicago*, 231 Ill. 463, the court said:

“Where the agents of a city are restricted by law as to the method of contracting, the city cannot be bound otherwise than by a compliance with the conditions prescribed for the exercise of the power. (*School Directors v. Fogelman*, 76 Ill. 189; *Tamm v. LaValle*, 92 *id.* 263; *Rogne v. People*, 224 *id.* 449.) The performance of work or furnishing material for a city and the acceptance of the resulting benefits will not render it liable to pay if the work was not authorized. The fact that the labor is beneficial will not create a liability.”

While, therefore, the City Council may authorize the payment of this claim, in case it is regarded as meritorious, no legal obligation against the city has arisen.

Yours very truly,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Licensing a Rest Cure as a Hospital.

August 13, 1917.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

Your communication of recent date, transmitted to this department, requesting an opinion as to whether the McDonald Rest Cure can be licensed as a hospital at the present time, considering the fact that it is located within 400 feet of a school, has been referred to me for attention.

From your communication we are advised that the McDonald Rest Cure has been operating as a hospital for some time and that it was established as a rest cure in 1910 and was licensed as a hospital in 1912. We assume from your letter that at the time it was established and licensed, the school which is referred to in your communication was then in existence and in the same location.

Section 1220 of The Chicago Code of 1911, provides as follows:

“1220. LOCATION OF HOSPITALS NEAR SCHOOL.) No hospital of any kind or description shall hereafter be erected or established within four hundred feet of any property used for public or parochial school purposes.”

It is plain, from the language of the foregoing section, that it was not intended that it should embrace within its scope hospitals that had been in operation prior to the enactment of that section. It is also true that the McDonald Rest Cure was not considered a hospital under the provisions of Section 1109 of The Revised Municipal Code of Chicago of 1905, and could not then be prohibited from operating because of its proximity to the school, under Section 279 or 691 of the 1905 Code. Upon the enactment of The Chicago Code of 1911, containing Section 1213, the McDonald Rest Cure comes within the definition of a hospital, and as such was required to be licensed under Section 1214.

This being the situation, the question immediately would arise as to the application of Section 1220, before referred to. It is apparent that although the McDonald Rest Cure did not come within the definition of a hospital under the 1905 Code, that it is included in the scope of Section 1220, which states that, “no hospital of any kind or description shall hereafter be erected or established, etc.,” which plainly intends that such places known as hospitals of any kind or description, erected previous to the enactment of Section 1220 should be permitted to remain within the prohibited distance.

I am therefore of the opinion that the McDonald Rest Cure, located at 5412 Ellis avenue, should be licensed to operate as a hospital at the present time.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Abandonment of Passenger Service by Railroad.

August 17, 1917.

TO THE HONORABLE, THE MAYOR AND THE CITY COUNCIL OF
THE CITY OF CHICAGO.

Gentlemen:

An order was passed by your Honorable Body, on April 30, 1917, reading as follows (Council Proceedings, p. 91):

“ORDERED, That the corporation counsel be requested to furnish this Council as soon as possible an opinion as to the right of the Chicago, Milwaukee and St. Paul Railroad Company to abandon its passenger service from the city to its Wilson avenue station.”)

Passenger service between the Union Station and Wilson avenue was practically abandoned by the Chicago, Milwaukee and St. Paul Railroad Company in 1907. We are informed that since that time, only two passenger trains daily have been operated between the points mentioned, and these have been apparently intended for, and in fact have been patronized almost entirely by employes of the company. The company recently filed a petition before the State Public Utilities Commission asking for authority to discontinue even this service, and such service has in fact now been discontinued.

The discontinuance of the general passenger service upon the line in question was coincident with the execution of an agreement between the Chicago, Milwaukee and St. Paul Railroad Company and the Northwestern Elevated Railroad Company, whereby the latter company was given the right to use the right-of-way of the former from Wilson avenue northward. The elevated company had at that time become a serious competitor of the railroad in the handling of local passenger traffic between Wilson avenue and the loop and the earning capacity of the railroad was unquestionably considerably reduced by this competition.

In determining the duty of the Chicago, Milwaukee and St. Paul Railroad Company, with respect to the rendering of this service, regard must be had to the public demand for such service and the possibility of making it self supporting. If the necessary operating expenses would more than equal

the possible financial returns from the operation of passenger trains between the points mentioned the courts would refuse to require the restoration of the service.

The Ohio and Mississippi Railway Co. v. People, 120 Ill. 200.

Commonwealth v. Pittsburg Railroad Company, 78 Mass. 180.

While the State Public Utilities Commission, which under the act of the Legislature of 1913 has jurisdiction over matters relating to railroad service, is not bound to apply strict legal rules, the reasonableness of any orders which it might make would be determined in some degree by the same considerations.

The duty of the Chicago, Milwaukee and St. Paul Railroad Company in connection with this passenger service, therefore, is primarily determined by the question whether the installation of such service is feasible from an operating standpoint. If any appreciable public demand exists for the resumption of this service, we believe that the proper course to pursue would be for those interested to file with the commission a petition setting out facts showing the practicability of passenger service upon this line.

The ordinance under which the Chicago, Milwaukee and St. Paul Railroad Company is operating the line in question did not reserve to the city authorities any power in reference to the character or amount of service rendered thereon by the company and the city is therefore not in a position to take any independent action in the form of an ordinance in reference to this question. If this company, however, has pending before the Council any application for a grant, license or privilege which the city is at liberty to grant or refuse, it might be proper to take up the question of requiring the continuance of this passenger service by way of negotiation in connection with such application.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Couvert Charge at Restaurants.

August 13, 1917.

HON. HARRY B. MILLER, Prosecuting Attorney.

Dear Sir:

Your communication of August 6, 1917, relative to a couvert charge made to patrons of the Terrace Gardens at the Morrison Hotel, has been referred to me for attention.

This matter is almost similar to a case which you had against the Restaurant Royale; at the time that the Royale case was under discussion, this department, under date of October 28, 1915, rendered the general superintendent of police, Charles C. Healey, an opinion in which it was pointed out that a couvert charge made by the Restaurant Royale was illegal. For your information a copy of that opinion is herewith transmitted.

Section 107 of The Chicago Code of 1911 provides:

“That no person or corporation, either as owner, lessee, manager, officer or agent, shall give, conduct, produce, present or offer *for gain or profit* any of the foregoing entertainments without a license issued for that purpose, which said license shall be issued and procured in the manner hereinafter set forth.”

The same section provides that any person or corporation violating any of the provisions of Section 107 shall be fined not more than two hundred dollars for each offense, and that each and every day upon which such person or corporation shall give, conduct, produce, present, offer or operate any such entertainment, shall constitute a separate and distinct offense.

From the foregoing it can be readily seen that if the Terrace Garden management, produce and conduct any of the entertainments or amusements outlined in Section 106 of The Chicago Code of 1911, and charge therefor, whether as an admission fee or as a couvert charge, it is required to take out a license for the production of such amusement or

entertainment and to otherwise conform with the ordinances of the City of Chicago relating to places of amusement.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Fees for Hospital Licenses.

August 22, 1917.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your communication of recent date, with reference to the new hospital ordinance, in which you ask us to advise you as to the following two inquiries:

1. What fee shall the city collector exact for a hospital license from an applicant who has been conducting a hospital since January 1, 1917?

2. What fee, if any, shall the city collector exact for a hospital license from an applicant who conducted a hospital since January 1, 1917, and which hospital during the preceding calendar year had given to its patients a sufficient percentage of free beds to entitle it to remission of the license fee for the year commencing January 1, 1917?

In reply, we beg to advise you that the new hospital ordinance became effective April 14, 1917, and provided, among other things, that the annual license fee should be \$50; that every such license should expire on the 31st day of December following the date of issuance, and when issued for a period of less than one year the fee to be paid for the unexpired license period should be the proportionate part of the annual rate, but no fee should be less than \$12.50.

The section of the ordinance regulating the issuance of hospital licenses, in force and effect prior to April 14, 1917, provided as follows:

“1216. LICENSE FEE—EXPIRATION OF LICENSE—LICENSE FEE REMITTED—WHEN.) The license fee to be

paid annually to the city collector for such hospital license shall be one hundred dollars. Every such license shall expire on the thirty-first day of December following the date of issue, and when issued for a period of less than one year, the fee to be paid for the unexpired license period shall be the proportionate part of the annual rate, but no fee shall be less than twenty-five dollars; provided, that if an affidavit is made by the applicant for such hospital license that the said hospital during the previous calendar year has given to its patients not less than ten per cent of its general average capacity of bed days for such calendar year free of charge of any sort (by bed days being meant the use of one bed for one day and its proportionate use of equipment and cost of maintenance, including food, medicine and care of nurses and physicians), then an inquiry shall be made into the facts set forth in such affidavit by the commissioner of health, upon whose recommendation the said license fee may be remitted."

In regard to your first inquiry, we beg to advise you that, if the owners of hospitals have secured a license, under the above section of the ordinance in force and effect prior to April 14, 1917, they are entitled to continue to operate their hospital or hospitals under the license issued to them in compliance with the former ordinance, and that the said license will not expire until December 31, 1917.

If there are any hospitals in the city that have been running without a license since January 1, 1917, and such hospitals under the old ordinance were not entitled to a remission of the license fee as provided in the old ordinance, then such hospitals should be required to pay a license fee for the year 1917, pro rated at the annual amount of \$100 up to and including April 14, 1917, and they should also be required to pay for the remainder of the year 1917 a license fee pro rated at the annual rate of \$50 per year.

In regard to your second inquiry, we desire to say that if the applicant has been conducting a hospital and under the terms of the ordinance had given the number of free beds specified in the ordinance to entitle him to a remission of the license fee, he is entitled to all of the benefits of the provisions of the said ordinance during the portion of the year

1917 up to April 14, when the new ordinance became effective, but that all such hospitals under the terms of the present ordinance are now required to take out a license fee for the unexpired portion of the year 1917, and to pay a license fee for the said unexpired portion of the year 1917, figured at the annual rate of \$50 per year.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Certificate for Partially Wired Building.

August 18, 1917.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

Your communication of recent date, requesting an opinion, as to whether you can refuse to issue a certificate for the wiring of a residence or apartment building unless such building has been completely wired, has been referred to me for attention.

We are given to understand by your letter, that persons and contractors partially wire a building and receive thereon a final certificate, and at some later date the owner or occupant of such partially wired building completes the wiring throughout the building without first obtaining a permit and without any inspection whatsoever.

Section 833, of The Chicago Code of 1911, provides when the commissioner of electricity shall issue a final certificate for complete installation and service but does not define what is meant by complete installation.

We understand from a careful reading of said section, that it applies to the particular amount of wiring actually installed at the time of the issuance of such final certificate, which might be the complete wiring of the building or a

partial wiring thereof. To better protect your department from the conditions above referred to, it would be well if, in the final certificate which you issue in accordance with Section 833, you designate the exact amount of wiring for which said final certificate is issued, and limit same, so that it can readily be determined from an inspection, if additional wiring has been placed in the building in violation of the ordinances regulating the installation and inspection of electricity in buildings.

Very truly yours,

DANIEL A. ROBERTS,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City for Goods Destroyed by Fire.

August 27, 1917.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

Referring to the claim of Lindsay Storage Company in which it reports that on May 10, 1915, while conveying a load of household goods from 6339 Kenwood avenue, city fire engines 8 and 25, on 22nd street and Archer avenue, set fire to and destroyed the property belonging to W. J. McAllister, same has been referred to us for an opinion.

There is no liability on the part of the city in cases of this nature, and in support of this view we quote from the opinion of Mr. Justice Walker in the case of *Wilcox v. City of Chicago*, 107 Ill., p. 338, in which it is stated:

“On turning to the reported cases of the courts of other states, we find a uniform line of decisions holding that cities are not liable for the negligent acts of the officers or men employed in their fire departments whilst in the discharge of their duty, thus creating an exception in this class of cases to the general rule of *respondeat superior*. In his work on Municipal Corporations, Dillon (1st ed., Sec. 774) says: ‘So, although a municipal cor-

poration has power to extinguish fires, to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, it is not *liable for the negligence of the firemen* appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire, ran over the plaintiff, in drawing a hose reel belonging to the city, on their way to the fire; nor for injuries to the plaintiff caused by the bursting of the hose of one of the engines of the corporation, through the negligence of a member of the fire department."

Continuing, on page 339, the following is stated:

"To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction. It would assuredly become too burthensome to be borne by the people of any large city, where loss by fire is annually counted by the hundreds of thousands, if not by the millions. When the excitement is over and calm reason assumes its sway, it may appear to many where other methods could have been adopted to stay destruction, that appear plausible as theories, and their utter fallacy can not be demonstrated by any actual test. To allow recoveries for the negligence of the fire department would almost certainly subject property holders to as great, if not greater, burthens than are suffered from the damages from fire. Sound public policy would forbid it, if it was not prohibited by authority."

The case in question is similar to the one cited and hence, it is our opinion that there is no liability on the part of the city.

Yours very truly,
ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Refund on Billboard Permits.

August 23, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We have your communication of the 5th instant, wherein

your committee has requested an opinion from this office as to whether the city is under any legal obligation to return fees paid for the issuance of billboard permits where the permits were not used.

It appears that on dates ranging from December 12, 1912, to September 7, 1916, claimant applied to the building department for and obtained permits numbered A-32718, A-32722, A-75576, A-14150, A-73257, A-32725, A-38825, A-37646 and A-31734, to erect billboards, paying for said permits a total of \$42. The claimant has filed a claim for the refund of said fees paid, and the communication requesting an opinion on the liability of the city to make such refund followed.

The ordinance now in force in reference to rebates of license fees, Section 1516 of The Chicago Code of 1911, 2nd paragraph, reads as follows:

“In no event shall any rebate or refund be made of any license fee or part thereof by reason of the death of the licensee or by reason of non-user of such license, or by reason of a change of location or occupation of such licensee.”

We are, therefore, of the opinion that the city is under *no legal obligation* to refund the fees for the non-use of said permits.

We also refer to opinions rendered on April 28, 1911, and March 18, 1912, on pages 25 and 719 respectively, of the Opinions of the Corporation Counsel from April 1, 1911, to December 31, 1912, relative to this matter, which hold to a like opinion.

We are herewith returning communication of Charles Bostrom, commissioner of buildings, dated June 22, 1917, nine permits granted to American Posting Service, and claim No. 7932 referred to us on July 5, 1917.

Yours very truly,

EMANUEL ELLER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right to Seal Firing Doors.

August 29, 1917.

HON. WILLIAM H. REID, Smoke Inspector.

Dear Sir:

Your communication of August 14, 1917, requesting an opinion as to whether you have authority to seal the firing doors of furnaces, under Section 2356 of The Chicago Code of 1911, in those cases where plants have been improperly constructed, has been referred to me for attention.

Section 2356 above referred to reads as follows:

“It shall be unlawful for any person to use any new or reconstructed plant for the production and generation of heat and power, or either of them, until he shall have first procured a certificate from the smoke inspector that the plant is so constructed that it will do the work required and that it can be so managed that no dense smoke shall be emitted from the chimney connected with the furnace or fire box.”

The section above set forth should be read in conjunction with the preceding section (2355) under which provision is made for the production by the owner of the plans and specifications of any new or reconstructed plant, and upon the approval of such plans and specifications and the filing of a duplicate set thereof in the office of the smoke inspector, and the payment of the fees provided for in Section 2359, the smoke inspector shall issue a permit for the reconstruction, erection and maintenance of such plant.

The penalty for the failure to comply with either Section 2355 or 2356 is provided for in Section 2361 of The Chicago Code of 1911. Unless Section 2356 is complied with by the person *using such plant* in the production and generation of heat and power, such person shall be liable to prosecution and fine, but the ordinances relative to smoke abatement do not provide for taking summary action such as you suggest until they have become a nuisance within the meaning of the ordinances.

Section 2358 provides when the emission of dense smoke within the city shall be a nuisance, and provides for summary

abatement thereof by the smoke inspector. Operation of plant is therefore necessary before any summary action can be taken to abate the nuisance.

It is my opinion that you can take summary action such as you suggest by sealing the firing doors of the furnaces only after such improperly constructed plant has been put into actual use, your remedy beforehand being only a refusal to issue a permit in accordance with Section 2355.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Entertainments on Municipal Pier.

August 7, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of July 27, 1917, in which you request to be advised if the comptroller is justified in approving and paying for expenses for entertainments and music on the Municipal Pier, or if the Harbor Board has the authority to incur such expenses.

At the last session of the General Assembly, two bills with reference to entertainments and concerts on the Municipal Pier were enacted into law; one, House Bill No. 457, permitted the use of the Municipal Pier for entertainments and concerts; and the other, Senate Bill No. 267, authorized the City Council of cities of over 500,000 "to order and direct that any city official may provide for or enter into any contract for the purpose of arranging for the holding or giving of concerts, entertainments, etc., and to provide for the payment of any expense necessarily incurred in the contracting for holding or giving of the same out of the miscellaneous receipts of the city not otherwise appropriated for."

We find that on June 29, 1917, the City Council (Journal

of the Proceedings of the City Council, June 29, 1917, p. 873) authorized the commissioner of public works:

“To engage the services of bands, as required, for concerts at the Municipal Pier, payment to be made from account 81 T, impersonal services (Concerts and Amusements).”

We would therefore say that if vouchers were presented to you, approved by the commissioner of public works, for services of bands at the Municipal Pier, the comptroller would be justified in approving and paying the same.

In answer to your inquiry as to whether the Harbor Board has authority to incur such expenses, we are of the opinion that it has no such authority. Nowhere in the ordinance creating said board can we find any duty imposed upon it to take care of any recreation facilities upon the pier. As a matter of fact, we find that when this ordinance was passed amendments offered to the same to provide for such duties were voted down by the Council (Journal of the Proceedings of the City Council, Jan. 19, 1916, p. 2952). Nor could the Council at that time provide for any recreation facilities upon the pier, for the reason that the Legislature had given no such authority to the city.

We are unable to find any order of the City Council directing any city official to assume the expenses of the Drama League of Chicago, the requisition for which accompanied your request. Unless an order has been passed directing a city official to assume these expenses, we are of the opinion that the same should not be approved or paid by you.

With reference to the voucher for the Chicago Band Association for the services of the band, said voucher should be signed by the commissioner of public works, in accordance with the Council order of June 29, 1917. If that is done, we see no reason why the comptroller should not approve the voucher and pay the same.

We return herewith requisition of the Harbor Board for payment of expenses of Drama League of Chicago, also vouch-

er in favor of the Chicago Band Association, forwarded with your request.

Very truly yours,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Duty of Railroad Co. to Maintain Lights at Grade Crossings.

August 31, 1917.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

Your letters of April 27th last, in regard to your controversy with the Chicago, Burlington & Quincy Railroad in the matter of their responsibility for maintaining street lamps at their grade crossings, has been referred to me for attention.

From the attached communications I understand that the Chicago, Burlington & Quincy Railroad object to being "singled out to pay the entire cost of maintaining these lights" while the street car companies occupy the same crossings.

From your communication of March 20, 1917, addressed to Mr. C. P. Bracken, General Manager of the Chicago, Burlington & Quincy Railroad Company, I ascertain that your controversy is about the following grade crossings:

Paulina St., S. of Blue Island Ave.
Lumber St., S. of 22nd St.
Canalport Ave., at Sangamon St.
22nd St., at Sangamon St.
Ford Ave. and 22nd St.
Ashland Ave. and 22nd St.
Union St. and 22nd St.
Halsted St. and 22nd St.
22nd St., at Jefferson St.
Lafin St. and 22nd St.
Throop St., at 22nd St.
Racine Ave., at 22nd St.
Loomis St., at 22nd St.

From the meager information before me I cannot determine whether or not they are used jointly by the street railway companies and the railroad company or by the railroad company alone. This matter you will necessarily have to determine for yourself, and apply the principles herein set forth.

The city ordinances relative to the matter in controversy are the following sections:

“2202. LIGHTS AT CROSSINGS.) Every person or corporation owning or operating any steam, elevated or street railway, whose track or tracks cross or intersect at, above or below the grade of any of the streets within the city, shall and they are hereby required to provide at their own expense proper and sufficient lights, and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the commissioner of public works.

“2203. PENALTY.) Any such person or corporation failing to comply with the provisions of the preceding section shall be fined not less than ten dollars nor more than one hundred dollars for each offense, and each day during which any crossing or intersection situated as aforesaid shall be permitted to remain without such lights after the first conviction shall constitute a separate and distinct offense.”

From a reading of Section 2202 of The Chicago Code of 1911, it is apparent that every steam, elevated or street railroad, whose tracks cross or intersect any of the streets within the city, must provide at their own expense, proper and sufficient lights. This section includes the words, “at, above or below the grade,” and would seem to indicate that although the tracks of the company had been elevated above or depressed below the city grade, that such company would still be compelled to furnish proper and sufficient lights at its own expense, but since the section above referred to was enacted, the Supreme Court of this state in the case of *City of Chicago v. Pennsylvania Company*, 252 Ill. 185, held that Section 1997 of The Municipal Code of 1905, identical to Section 2202, was invalid, in so far as it applied to railroad crossings on elevated structures above the grade of the streets.

This decision did not impair the ordinance as to tracks

of these companies at or below the city grade, and as to those classes the ordinance is still in force and effect, and we believe a valid exercise of the city's police powers.

From an examination of the list of streets referred to in your letter of March 20th last above referred to, you may determine whether or not the Chicago, Burlington & Quincy Railroad has its tracks "at, above or below the city grade."

In reference to the matter of the joint use of grade crossings by several companies, we believe that that is a matter of adjustment which can be settled in those few instances where there are street crossings used jointly (if there are any such). Without having any direct information on the point, we apprehend that such instances exist but are very rare, because under our interpretation of the ordinance, they can occur only when the street car tracks and the street railroad tracks run parallel to each other and are contiguous, or where by some diagonal arrangement of tracks, or streets, they cross each other at or near some public street. We doubt very much whether this condition exists at any of the crossings mentioned. If it does, we recommend that an attempt be made to divide the charge to the satisfaction of both parties. If that cannot be done, then a prosecution may be commenced, and the defendants therein may find some way to adjust the matter between themselves.

Your department may invoke the aid of Section 2203 of The Chicago Code of 1911, and prosecute them for their failure to do so. In the matter of an equitable adjustment in the event that the city has been compelled to install and operate proper and sufficient lights, the facts and circumstances of each individual case should determine the charge your department should make.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**City's Right to Compensation from Stock Quotation
Telegraph Co.**

July 30, 1917.

HON. EUGENE R. PIKE, City Comptroller. .

Dear Sir:

We are in receipt of your letter dated May 1st, with enclosure of a letter received from Mr. William M. Klein, President of the Stock Quotation Telegraph Company, in which you request an opinion as to the city's right to compensation under an ordinance passed June 15, 1914, granting to the Stock Quotation Telegraph Company of Illinois the right to construct, maintain and operate a line of electric wires for the transmission and distribution of general and financial news and market reports by Morse and "ticker" instruments, upon the basis of the gross receipts of the Chicago News Bureau, a corporation which, since 1915, has been leasing bulletin printing instruments known as "tickers" from the Stock Quotation Telegraph Company of Illinois and has been engaged in business of the kind authorized under the ordinance above referred to.

The Stock Quotation Telegraph Company of Illinois has never exercised the privilege, granted by the ordinance of June 15, 1914, of installing a system of electric wires for the purpose of carrying on the business therein authorized, but entered into an arrangement with the Chicago News Bureau, by which the latter company obtained the right to use "tickers" of the Stock Quotation Telegraph Company upon paying a royalty and certain other consideration therefor. This arrangement was later embodied in a contract entered into by and between the two companies under date of September 1, 1916, which provided that the Stock Quotation Telegraph Company should furnish such "tickers" to the Chicago News Bureau in such numbers as the latter should require, and that for the use of such "tickers" the Stock Quotation Telegraph Company should receive a royalty of \$3.50 per month each; and, as additional consideration, the amount due from the Stock Quotation Telegraph Company to the City of Chicago

under this ordinance, viz.: three per cent of its gross receipts, also \$100 per year, representing the premium on the bond deposited by the Stock Quotation Telegraph Company with the City of Chicago under said ordinance, and \$125 per year "representing two and one-half per cent per annum on \$5,000, being the investment of the Stock Quotation Company in the franchise granted by the City of Chicago." The News Bureau further agreed to reimburse the Stock Quotation Company for all annual payments to the City of Chicago and bond premiums paid between the date upon which the News Bureau began to operate in the City of Chicago and the date of the contract.

The position of the Stock Quotation Telegraph Company as stated by Mr. Klein in the letter above referred to is that it is not exercising the privileges granted to it by its ordinances. The company has, however, paid to the city certain compensation as provided by the terms of the ordinance, and for the year 1915 this compensation was computed upon the basis of the gross earnings of the Chicago News Bureau. Mr. Klein now states that the payment upon this basis was an error, but the company has, nevertheless, recently paid to the city an amount representing three per cent of the sum received by it from the Chicago News Bureau during the year 1916, as royalties for the use of the Stock Quotation Telegraph Company's "tickers," under the contract previously referred to, the amount so received being, according to Mr. Klein, the gross receipts of the Stock Quotation Company upon which compensation to the city should be based.

The Stock Quotation Telegraph Company has thus indicated its willingness to comply with the terms of the ordinances with respect to compensation to the city, even though the contention is now made that it is not making use of the ordinance, and the only question requiring consideration therefore, is whether or not the city is entitled to compensation based upon the gross receipts of the Chicago News Bureau, or only to three per cent of the royalties received from the Chicago News Bureau as compensation for the use of the instruments.

It is apparent that even if the Stock Quotation Telegraph Company is correct in stating that its compensation to the city should be based upon the revenue which it derives from the Chicago News Bureau for the use of its "tickers," this compensation should be based not alone upon the royalties received but also upon all other compensation provided for by the contract of September 1, 1916. The obligation of the Chicago News Bureau to pay the amount due to the city under the Stock Quotation Company's ordinance, as well as the amount representing the annual premium on the bond deposited with the city and the sum representing two and one-half per cent of the investment in the franchise are stated in the contract to be additional consideration to be paid under the terms thereof. We are advised that the compensation paid to the city for the year 1916 is based entirely upon the royalties provided for by the contract. This is clearly insufficient whatever may be the correct conclusion with reference to the right of the city to compensation based upon the gross receipts of the Chicago News Bureau.

Prior to the date upon which the Chicago News Bureau began business in the City of Chicago, Mr. W. N. Record, general manager of the company, wrote a letter to the city comptroller dated May 22, 1915, which reads as follows:

"On June 1, the Chicago News Bureau, operated by the Stock Quotation Telegraph Company, of Illinois, will begin operation in the City of Chicago, under the privileges granted by the ordinance which was passed in its favor, under the conditions of such ordinance, and the record published in the Journal of the Proceedings of the City Council of the City of Chicago at the regular meeting Monday, June 15, 1914. This ordinance is published on page 805 of the report.

This is to give the city the proper notification and to advise your department and that of the city electrician, of the purpose of this organization. For the present, and until further notice, the above organization will not, of its own account, tear up any city streets. Its operations will be confined principally to the loop district, and it will lease its facilities from the Western Union Telegraph Company, who are at present in control of the circuits used for its Broad Tape Ticker service,

which the above organization will take over and operate independently upon June 1.

In due time, the city will be notified concerning the earnings of this organization as required by the ordinance. Charts showing the location of its instruments will be furnished the city electrician as soon as possible.

If we have not now met your requirements with respect to our beginning business, would respectfully request that you furnish us with the nature of any further requirements which we must meet."

The city was thus notified that the Chicago News Bureau was operated by the Stock Quotation Telegraph Company and intended to exercise the privileges granted by the ordinance which was passed in favor of the latter company. On the stationery of the Chicago News Bureau also has at all times appeared after the name of the company the words "operated by the Stock Quotation Telegraph Company of Illinois."

Every indication is, therefore, that in basing the compensation under this ordinance for the year 1915 upon the gross receipts of the Chicago News Bureau the officials of the latter company, which under the contract of September 1, 1916, has assumed the obligation of the Stock Quotation Telegraph Company in the matter of compensation to the city under its ordinance, acted with full appreciation of the relationship of the two companies with each other and with the city, and intended to make their actions conform to their expressions of purpose contained in their representations to the city comptroller.

It may be conceded that, if all the statements of fact and intention contained in the letter of May 22, 1915, and embodied in the letter-heads of the Chicago News Bureau, are incorrect and that company is not operated by or on behalf of the Stock Quotation Telegraph Company under the latter's ordinance, then the city is not entitled to compensation upon the basis of the Chicago News Bureau's earnings. The record before us, however, shows that the Chicago News Bureau has from the beginning of operations in Chicago expressed its intention to operate under this ordinance; it has used the instruments of the Stock Quotation Telegraph Com-

pany in carrying on its business; it has assumed all of the burdens of the Stock Quotation Company under the ordinance; compensation in the past has been paid to the city upon the basis of the earnings of the News Bureau, and, unless the Chicago News Bureau may be regarded as representing the Stock Quotation Telegraph Company in the conduct of its business, the latter has in effect contracted away its rights under the ordinance enacted in its favor to an independent corporation, for the term of its contract with the Chicago News Bureau, in violation of the spirit if not the express provisions of the ordinance.

The Chicago News Bureau has even now indicated no change in the attitude which it has heretofore uniformly assumed. Since the latter company, rather than the Stock Quotation Telegraph Company, is the party interested primarily, as previously pointed out, in the compensation paid to the city, having assumed the obligations of the Stock Quotation Telegraph Company in that regard, we are unable to concede the correctness of the position asserted by Mr. Klein as president of the Stock Quotation Company. Upon the basis of the Chicago News Bureau's own representations, the city is entitled to compensation under the ordinance amounting to three per cent of its gross receipts, and we believe your department is justified in demanding compensation for the year 1916 upon this basis.

Very truly yours,

RALPH G. CRANDALL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Discontinuance of Pension.

September 6, 1917.

BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND OF THE
CITY OF CHICAGO.

Gentlemen:

We are in receipt of your communication of August 30,

1917, requesting us to advise you as to the power of the Board of Trustees of the Municipal Pension Fund to discontinue paying a pension to Mrs. Mae Wachsmuth-Thurston, pensioned under the disability section of the act, who, while receiving the payments, got married.

In reply we beg to advise you that the board is authorized to grant disability pensions under the provisions of Section 9 of the Municipal Pension Fund Act, which section provides as follows:

“Sec. 9. Any employee who has been in the service of said city, village or town for a period of five (5) years or more, from and after July 1, 1911, shall have the right to retire from active service on account of serious disability, rendering him or her unable to properly discharge his or her duties, and may become a beneficiary under this act and be entitled to receive pension in an amount equal to that provided for an employe who retires under the provisions of Section 7 hereof and whose payments into the fund, in form of deductions from salary or wages and payments as prescribed in Section 1 hereof, are equal to those of said disabled employe.

“Proof of disability shall be furnished to the board of trustees by at least one licensed and practicing physician of such city, village or town, who shall be elected by said board, and said board may require other evidence of disability. Each such disabled employe who shall receive pension under the provisions of this section shall be examined at least once a year by one or more licensed and practicing physician or physicians elected by said board. Such physician or physicians shall advise said board whether the disability of such employe continues or not. When the disability of any such employe ceases, the said board shall discontinue payment of pension to such employe, and he or she shall be returned to active service at the same salary which he or she received before retirement on account of disability as soon as may be under the laws and rules governing the civil service of such city, village or town.

“If any employe receives any compensation or allowance from such city, village or town, under and by virtue of the law known as the Workmen's Compensation Act or other similar act, the pension herein provided for such employe shall be reduced by the amounts so received if they be less than the amounts of such pension, and if any

employe receives a sum or sums as compensation or allowance in excess of the pension herein provided for such employe, he or she shall not receive any pension until after the expiration of the period of time during which pension payable at the rate herein stated would equal the amount of such excess sum or sums."

Section 4 of the Municipal Pension Fund Act provides in part as follows:

"Said board shall have the power and it shall be its duty to hear and determine all applications for pensions under this act and to suspend the payment of pensions when disability ceases."

Under the provisions of the Municipal Pension Fund Act the Board of Trustees of the Municipal Pension Fund are only authorized to grant disability pensions when evidence is presented in accordance with the statute sufficient to convince the board that the physical condition of the person making application for said pension is such that it is impossible for him or her to properly discharge the duties of the position that he or she may hold at the time when the application for disability pension is made. When the board has acted upon the application and has granted a pension to the applicant it is conclusive evidence that sufficient facts have been presented to the board to convince it that the person is physically disabled from performing the duties of the position that he or she may hold. When the Municipal Pension Board once finds that an applicant is disabled the disability must be presumed to exist until evidence is presented sufficient to convince the board that the disability existing at the time the pension was granted has ceased.

The Board of Trustees of the Municipal Pension Fund is a quasi municipal corporation created by statute and possesses only such power as the Legislature has seen fit to confer upon it, together with such power as may be necessarily implied from the power expressly conferred upon it by statute to enable it to properly administer the Municipal Pension Fund.

If the statute was silent as to the power of the board to

suspend the payment of pensions at any time in its discretion a matter of law, that the board impliedly had the power to suspend the payments of pensions at any time in its discretion. However, such is not the fact. The Legislature has expressly provided under what circumstances the board may order the suspension of the payment of pensions granted, and the board must exercise that power in accordance with the provisions of the statute. In order to suspend the payment of a pension granted under the disability section of the act the board must have some evidence before it to enable it to find that the disability has ceased to exist and the board must make a finding to that effect before the payment of the pension can be suspended.

While the question of the marriage of a lady during the time she is receiving a disability pension from the pension fund may be taken into consideration in determining the question of whether or not the disability has ceased to exist, we are unable to hold as a matter of law that the marriage of such person conclusively determines that question. We therefore recommend that you direct the above mentioned person to submit to an examination by the physician of the board and that such other evidence as the board may desire be furnished by the pensioner in order to show that she is still entitled to receive a pension under the disability section of the act. Until the board makes a finding that the disability existing at the time Mrs. Wachsmuth-Thurston was granted a pension has ceased to exist she is entitled to receive her disability pension.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Arrests in Cases Affecting Public Morals.

September 11, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

In response to your request for an opinion as to the power and duty of the second deputy superintendent of police personally to make arrests in the enforcement of laws and ordinances pertaining to all matters affecting public morals or to cause such arrests to be made by members of the police force, we beg to say:

(1) We have found two opinions written by Assistant Corporation Counsel Grossman and approved by Corporation Counsel Sexton which shed some light on the questions presented.

(a) The first of these opinions is dated December 16, 1912, and is addressed to Hon. Ellis Geiger, Chairman, etc. (Opinions of the Corporation Counsel from April 1, 1911, to December 31, 1912, page 1244) and relates to the validity of the ordinance for the reorganization of the Police Department. This opinion contains the following:

“A careful examination of the provisions of the proposed ordinance will disclose that it was framed in view of the clearly defined distinction between policemen and those who are not policemen. In a city like Chicago with its great population and its intricate governmental machinery, the necessity of extending the functions of the Police Department which incidentally arise in the preservation of peace and good order within its limits is very apparent. These incidental duties do not necessarily require the performance of such police powers as are enumerated in the statutes, and yet they are so closely related to the performance of such duties that they must necessarily be performed under the supervision of the superintendent of police.

“Under the ordinance the Police Department is divided into two bureaus, at the head of each of which is one deputy superintendent. The first deputy superintendent is placed in immediate control over the active

bureau; the second deputy superintendent is in charge of the clerical, mechanical and inspection bureau.

"In the active bureau is placed the nucleus of the Police Department, the police force, composed of policemen charged by law with the duty of suppressing crime. None but the members of the police force are given the power to make arrests.

"The lines of duties imposed by the ordinance upon all of the members of the department who are not policemen are clearly distinguishable from what are commonly known as police duties. They are concerned with the business management of the department, the clerical work thereof, the care and custody of its properties, the instruction of the police force and the investigation and inspection of the police force in the performance of their duties and in the maintenance of their stations and equipment.

"There remains only to be considered the question whether the manner of appointment of some of the members of the department is contrary to law.

"An objection has been raised to the ordinance because it provides that the second deputy superintendent of police shall not be a member of the police force. It is urged that insasmuch as the second deputy superintendent of police is equal in rank to that of the first deputy superintendent and higher in rank to other officers who are members of the police force of the City of Chicago, those in the next lower civil service grade or rank to that of the second deputy superintendent of police are entitled to compete in an examination to be held for the filling of the office of the second deputy superintendent of police, whereas, under the ordinance members of the police force who, it is claimed are next lower in rank are barred from the position of second deputy superintendent.

"The objectors to this feature of the ordinance gravely misconstrue the Civil Service Law applicable to this case. While the second deputy superintendent and the first deputy superintendent are equal in rank, the difference in their duties is such as to necessitate their classification in different kinds of service. Thus the Civil Service Commission may classify the first deputy superintendent of police in the police service of the City of Chicago while they may classify the second deputy superintendent of police in the clerical service or the supervising service, as the case may be, and hence that position is not one to which any member of the police force may be promoted."

(b) The other opinion is dated November 13, 1913, and is addressed to Hon. James Gleason, General Superintendent of Police (Opinions of the Corporation Counsel from January 1, 1913, to October 5, 1914, page 564).

This opinion states the questions which are submitted to be as follows:

“Under date of October 29, 1913, this department received two communications signed by Major M. L. C. Funkhouser, second deputy superintendent of police, inquiring: (1) whether the assistant inspectors of morals have lawful authority to arrest citizens violating city ordinances or state laws; (2) whether the department inspector and the inspector of morals have lawful authority to arrest any member of the police force who is found violating either the ordinances of the city or the department rules.”

The opinion then quotes Section 12 of Article VI of the Cities and Villages Act, which prescribes what officers shall be conservators of the peace and then concludes as follows:

“Neither the department inspector nor the inspector of morals nor the assistant inspectors of morals are designated as policemen or constitute any part of the police force of the City of Chicago, under the terms of the so-called ordinance for the reorganization of the police department, passed December 30, 1912. None of the officers above mentioned are given authority under any ordinance of the City of Chicago to arrest any person found violating any ordinance of the city or any criminal law of the state.

“Under Section 1920 of The Chicago Code of 1911, you may, however, appoint all of the officers named as special policemen who will possess the same powers as the regular police patrolmen and will be subject to all rules and regulations governing the police force.

“In that event, they may arrest citizens and members of the police force (including captains, lieutenants and sergeants of police), violating any ordinance of the city or criminal law of the state.

“In no event, however, has any person, whether he be a member of the police force or a special policeman, authority to arrest any member of the Police Department found violating the rules of the department. The proper procedure in such case is to file charges with the Civil Service Commission.”

It will be observed that the opinion last quoted from, treats of the power of the inspector and assistant inspectors of moral conditions to make arrests; and does not specifically deal with the power of the second deputy superintendent of police; but it seems to us that a reasonable construction of the police re-organization ordinance requires the second deputy superintendent to be placed upon the same basis as such inspector and assistant inspectors of moral conditions, so far as the power to make arrests is concerned.

This appears from Section 1912, which reads as follows:

“The Department of Police of the City of Chicago is hereby divided as follows:

1st. The Active Bureau.

“Under the immediate supervision of the first deputy superintendent of police the Active Bureau shall consist of said first deputy, the chief of detectives, the chief operator, the chief surgeon, the foreman of horses, the veterinary surgeon, the pound-master, the identification expert, and such number of captains, lieutenants, sergeants, patrolmen, patrolwomen, surgeons, drivers, chauffeurs, matrons, operators, clerks and employes as may, from time to time, be provided for in the annual appropriation ordinance.

2nd. The Clerical, Mechanical and Inspection Bureau.

“Under the immediate supervision of the second deputy superintendent of police, said bureau shall consist of said second deputy, the secretary of the department, the manager of properties, the custodian of lost and stolen property, the department inspector, the inspector of moral conditions, the director of instruction, the foreman of shops, and such number of inspectors, instructors, clerks and other employes as may, from time to time, be provided for in the annual appropriation ordinance.

“The deputy superintendents of police shall be equal in rank and shall report daily to the general superintendent of police all matters of police and department business coming to their attention.”

It is our opinion, therefore, that in order to authorize the second deputy to make arrests he should be appointed as a special policeman under Section 1920 of The Chicago Code of 1911.

(2) But the ordinance for the re-organization of the Police Department, referring to the second deputy superintendent of police in section 1914, expressly provides as follows:

“The second deputy superintendent of police shall not be a member of the police force. Under the direction of the general superintendent of police, he shall be charged with:

* * * * *

“(7) The supervision of the strict enforcement of all laws and ordinances pertaining to all matters affecting public morals;”

In the Century Dictionary “supervision” is defined as follows:

“The act of supervising or overseeing; oversight; superintendence; direction; as, to have the supervision of a coal mine; police supervision.”

And “supervise” is defined by the same dictionary as follows:

“To oversee; have charge of, with authority to direct or regulate; as, to supervise the erection of a house. The word often implies a more general care, with less attention to and direction of details, than superintend.”

In 8 Words and Phrases Judicially Defined, at page 6797, citing *State v. Freemont, E. & M. V. R. Co.*, 35 N. W. Rep. 118, 124, 22 Nebr. 313, it is said:

“‘Supervision’ is defined by Webster to be ‘the act of overseeing, inspection, or superintendence,’ and is so used in an act giving a Board of Transportation general supervision of railroads; and hence the act clothes the board with necessary powers for such purposes.”

In *State v. Chicago, M. & St. P. Ry Co.*, 130 N. W. Rep. 802, at page 804, the Supreme Court of Iowa used the following language:

“To supervise is to superintend, to direct, to have charge over, with the power of direction.” Citing Webster’s International Dictionary.

In *Von Rosenberg, et al. v. Lovett*, 173 S. W. Rep. 508, the Court of Civil Appeals of Texas, on page 514 said:

“To supervise does not mean to do the work in detail, but to see that it is done. It means to oversee, with power of direction. * * * When the law requires the performance of a duty by any one, it impliedly grants him the power to do the things reasonably necessary to discharge such duty. It would be a vain thing to impose upon any one a duty, and deny him the means whereby he could perform such duty.”

Thus, by the ordinance above quoted, the second deputy superintendent of police is “under the direction of the general superintendent of police charged with the supervision of the strict enforcement of all laws and ordinances pertaining to all matters affecting public morals,” and we entertain no doubt that in the exercise of such supervision he has authority to require arrests to be made by members of the police force.

Very truly yours,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Refunds from Pension Fund.

September 6, 1917.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND
 OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your communication of recent date in regard to the applications for a refund of money contributed by employes of the Municipal Tuberculosis Sanitarium of the City of Chicago prior to July 1, 1917.

In reply, we beg to advise you that the Municipal Pension Fund Act was passed for the benefit of employes employed in cities, villages and towns under and by virtue of an act entitled, “An Act to regulate the civil service of cities,” approved and in force March 24, 1895.

The act of the General Assembly of the State of Illinois authorizing the erection and operation of the Municipal Tu-

berculosis Sanitarium was passed a long time subsequent to the passage of the Civil Service Law, and under the decisions of the Supreme Court of our state the Civil Service Law did not apply to the said institution, and the employes of said institution were not under its protection until the law was amended, and the said law as amended did not become effective until July 1, A. D. 1917.

We are, therefore, of the opinion that all of the money deducted from the salaries of the former employes of the Municipal Tuberculosis Sanitarium was erroneously deducted, and that the Board of Trustees of the Municipal Pension Fund had no power or authority under the law to receive the same.

We, therefore, recommend that your board order and direct that a refund of all money deducted from the salaries of any and all employes of the Municipal Tuberculosis Sanitarium who worked in said institution prior to July 1, A. D. 1917, and who have not been legally certified subsequent to that date, be refunded to such employes as may make application therefor.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Exemptions from Water Rates.

September 11, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

I have your communication of August 25, 1917, referred to this department, wherein you state that the American Hospital and Training School for Nurses, No. 850 Irving Park Boulevard, has applied to the Bureau of Water through Judge Charles N. Goodnow for exemption from water rates under

Section 2755 of The Chicago Code of 1911; also that the application of said corporation shows it has \$60,000 in capital stock. Your question then follows whether in our opinion under these conditions the premises in question are exempt from payment of water taxes.

The ordinance above referred to as Section 2755 of The Chicago Code of 1911, provides:

“The Commissioner of Public Works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and *which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution.*”

The City Council has indicated in the above ordinance that its construction must be strict.

The question then arises whether under the above ordinance the American Hospital and Training School for Nurses is a charitable institution carrying on the charitable purposes of said institution and is not being used for gain or profit. In your communication you state that the application of said corporation shows that it has a capital stock of \$60,000. The mere fact that a corporation has capital stock is in itself an inference that it has the power to declare dividends and is therefore being used with a view of profit. (*Parks v. Northwestern University*, 218 Ill. 381.)

A perusal of the certificate of incorporation of the American Hospital and Training School for Nurses filed in the Recorder's Office of Cook County, Illinois, on September 28, 1908, as Document No. 4266360 in Book 146 of Corporations, page 9, shows in the statement of said certificate that the object for which said corporation is formed, is as follows:

“The object for which it is formed is a general hospital, training school for nurses, *dispensary manufacture and sale of pharmaceutical preparations, medical appliances and instruments* and post graduate school.”

The capital stock of said corporation originally was \$5,000, but successive increases have brought it up to \$60,000, which is added proof in determining that said institution was formed with a view to profit. It was not contemplated by the above ordinance that such institutions, viz.: those formed for the purpose of gain and profit, should be exempt from the payment of taxes.

In the case of *The Monticello Seminary v. Board of Review of Madison County*, 249 Ill. 481, the court said:

“The right to enjoy exemption from taxation can only be established by strict proof of the existence of all the facts necessary to authorize such exemption.”

To the same effect see: *The People ex rel. John R. Thompson County Treasurer, Appellee v. The Ravenswood Hospital*, 238 Ill. 137, and *In re Walker*, 200 *id.* 566.

It was also held in the case of *The People ex rel. John R. Thompson, County Treasurer, Appellee v. The Ravenswood Hospital, supra*, that:

“The property of a hospital corporation organized for pecuniary profit is not exempt from taxation, although actually and exclusively used for charitable purposes since its organization.”

Also citing:

People v. Camp Meeting Ass'n, 160 Ill. 576.

People v. Anderson, 117 *id.* 50.

Catholic Knights v. Board of Review, 198 *id.* 441.

McCullough v. Board of Review, 183 *id.* 373.

Montgomery v. Wyman, 130 *id.* 17.

Fletcher on Corporations, page 569.

It will be seen from the above that even though there is provision made in the Constitution for the exemption from taxation of charitable institutions the law will always be strictly construed.

Therefore, in view of the law as stated, applied to the facts herein presented, we are of the opinion, that the American Hospital and Training School for Nurses is a hospital

corporation organized for profit and is not exempt from the payment of water rates under the ordinance above referred to.

Yours very truly,

EMANUEL ELLER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Labor Laws Affecting the House of Correction.

August 15, 1917.

HON. JOSEPH SIMAN, Superintendent, House of Correction.

Dear Sir:

Your communication of August 4th, addressed to Hon. Samuel A. Ettelson, corporation counsel, requesting him to advise you as to the different ordinances of the City of Chicago, bearing upon the question of labor contracts, the sale of products and anything that tends to limit your activities in working the inmates of the House of Correction, has been referred to me for an opinion.

In reply thereto I beg leave to call your attention to the various sections of the ordinances and statutes relative to labor in the House of Correction and co-related matters. The provisions of the statutes relating to Houses of Correction, Hurd's Revised Statutes 1915-16, Section 1, Chap. 67, reads as follows:

"That it shall be lawful for the municipal authorities of any city within this state to establish a house of correction, which shall be used for the confinement and punishment of criminals, or persons sentenced or committed thereto under the provisions of this act, or any law of this state, or ordinance of any city or village, authorizing the confinement of convicted persons, in any such House of Correction."

Sec. 3. "That whenever a board of inspectors has been organized as in Section 2 of this act directed that they shall have power and authority to establish and adopt *rules for the regulation and discipline of such houses of correction* * * * to make all such by-laws

in relation to the management and government thereof as they shall deem expedient." * * *

Sec. 5. "The books of the said house of correction shall be so kept as to clearly exhibit the state of the prisoners, the number received and discharged, the number employed as servants or in cultivating or improving the premises, *the number employed in each branch of industry carried on, and the receipts from, and expenditures for, and on account of, each department of business, or for improvement of the premises.*" * * *

Sec. 8. "The Board of Supervisors or Commissioners of any county, and the Board of Trustees of any village or town, in any county in this state, in which a house of correction is established, shall have power and authority to enter into an agreement with the legislative authority of such city, or with any authorized agent or officer in behalf of such city, to receive and keep in said house of correction any person or persons who may be sentenced or committed thereto, by any court or magistrate, in any of said counties, etc." * * *

Sec. 9. "In counties, towns and villages having such agreement with any such city it shall be the duty of every court, police justice, justice of the peace, or other magistrate in such county, town or village, by whom any person, for any crime or misdemeanor, punishable by imprisonment in the county jail, shall be convicted, to commit such person to said house of correction, in lieu of committing him to the county jail, village or town calaboose, there to be received, and kept in the manner prescribed by law and *the discipline of said house of correction.*" * * *

Sec. 10. "It shall be the duty of the sheriff, constable or other officer in and for any county having such agreement with any such city to whom any warrant of commitment for that purpose may be directed by the courts, justice or magistrate aforesaid, in such county, to convey such person so sentenced to the house of correction, and there deliver such person to the keeper or other proper officer of said house of correction, whose duty it shall be to receive such person so sentenced, and to safely keep *and employ such person* for the term mentioned in the warrant of commitment, *according to the laws of said house of correction;* etc. * * *

Sec. 11. "All provisions of law and ordinances authorizing the commitment and confinement of persons in jails, bridewells and other city prisons, are hereby made

applicable to all persons who may or shall be, under the provisions of this act, sentenced to such house of correction."

Sec. 13. "The expenses of maintaining any such house of correction over and above *all receipts for the labor of persons confined therein*, * * * shall be audited and paid from time to time by the legislative authority of such city, etc. * * *"

Chap. 24, Hurd's Revised Statutes 1915-1916, Para. 299.

Sec. 1. "Any person upon whom any fine or penalty shall be imposed may, upon the order of the court or magistrate * * * be committed to the * * * house of correction * * * until such fine, penalty, and costs shall be fully paid. * * * The City Council * * * of such cities or villages shall have power to provide by ordinance that every person so committed *shall be required to work at such labor as his or her strength will permit*, within and without such prison or house of correction * * * not to exceed ten hours each working day and for such work the person so employed or worked shall be allowed, exclusive of his or her board, the sum of fifty cents for each day's work on account of such fine and costs."

Chap. 38, Hurd's Revised Statutes 1915-16, Para. 168, provides that "every person convicted of larceny * * * if the property stolen is of the value of fifteen dollars, or less, shall be confined in the county jail, or sentenced *to labor in the work-house* of the county, city or town, where the conviction is had."

Paragraph 168A contains a similar provision in reference to persons convicted in any court of record of any misdemeanor under the criminal code of this state, and provides for a sentence of *such persons to labor in the work-house*.

Paragraph 168B provides that any person convicted of petit larceny, or any misdemeanor punishable under the laws of this state, in whole or in part by fine may be required by the order of the courts of record, in which the conviction is had, to work out such fine and all costs, in the work-house of the city, town or county * * * at the rate of one dollar and fifty one hundredth dollars (\$1.50) per day for each day's work.

The ordinances of the City of Chicago relative to the subject matter under discussion are found in Sections 1494 to 1507 inclusive, of The Chicago Code of 1911, and in the Journal of the Council Proceedings of July 22, 1912, at page 1490, which is an amendment of Section 1505 and relates to contracts for the necessary expenses and repairs of the House of Correction.

“Sec. 1497. *What prisoners to be received—prisoners to labor—credit for labor performed.*.) It shall be the duty of said superintendent to receive into the said house of correction such persons as may be committed thereto by any court or magistrate in Cook County, authorized by the laws of the state or by any ordinance of the city, or any town or village in Cook County having a contract with the city for the care of its prisoners, and to put each of such persons so committed, as are able to labor, to the work which they are respectively best able to do, not to exceed ten hours for each working day. Every person committed to the house of correction by a judge of the municipal court for a violation of any city ordinance, shall be allowed for each day’s work exclusive of his or her board, the sum of fifty cents, which shall be applied in payment and satisfaction of the fine and costs imposed upon such person.”

“Sec. 1498. *County prisoners.*.) Under any agreement to that effect between the city and the Board of Commissioners of Cook County, the superintendent shall also receive into said house of correction any person or persons who may be sentenced or committed thereto by any court or magistrate in and of Cook County, when such commitment is for a time not less than thirty days.”

“Sec. 1504. *Board of inspectors to make rules.*.) The board of inspectors shall have the right to make all proper rules and regulations for the purpose of carrying out the provisions of this chapter.”

“Sec. 1507. *Prisoners from other counties, towns and villages.*.) The board of inspectors of the house of correction are hereby authorized to make contracts with any county in the state, or with the trustees of any town or village in Cook County, for the care and custody of prisoners for any term, at a price not less than twenty-five cents per day for each such prisoner. All contracts shall extend for the care of such prisoners until the expiration of their terms of sentence; and the labor of

every such prisoner shall be the property of, and for the benefit of, the city."

The foregoing are the statutes and ordinances having relation to the working of persons convicted of crimes and misdemeanors who are required by law to be confined in the House of Correction. There are no statutory enactments as to the kind or character of work at which prisoners so confined are to be employed, but by reading the foregoing it will be apparent that it is intended by the law making bodies that persons so confined shall be placed at such employment as is prescribed by the rules and regulations of the House of Correction, the only limitation upon such employment being a statutory requirement that the person be required to work at such labor as his or her strength will permit and that such persons should not be required to labor more than ten hours for each working day. There are several classes of prisoners in the House of Correction, each class receiving a sentence from a different jurisdiction, the laws of which differ somewhat and in some instances it might be asserted that certain prisoners should not be put to labor, inasmuch as their sentence does not specifically call for labor. It has been held by various courts that all prisoners are subject to the same discipline in such an institution, and if the discipline in such institution includes labor, such person will be required to labor as all other prisoners. *Ex parte Clark*, 50 U. S. 647, *U. S. v. Pridgeon*, 153 U. S. 48. Labor in a penal institution or a reformatory may be regarded either as a punishment or as a method of discipline.

The question of the contracts made for prison labor has been a subject of some litigation prior to the year 1886, at which time there was an amendment to the Constitution adopted by the people of the State, which reads as follows:

"Hereafter it shall be unlawful for the commissioners of any penitentiary or other reformatory institution in the State of Illinois, to let out by contract to any person or persons, or corporations, the labor of any convict confined within said institution."

This amendment may seem to apply only to prisoners of state reformatory institutions, but I am of the opinion that

considering the words "reformatory institution" in the light of the authorities on such phrases that it would include such an institution as the House of Correction of the City of Chicago. That being the case, it would be impossible to let to labor any persons confined in the House of Correction by contract.

As to the question of the sale of the products of the House of Correction, I call your attention to Section 5, of Chapter 67, which is above set forth. The section provides that the books of said House of Correction shall be kept so as to clearly exhibit the state of the prisoners, the number employed in each branch of industry carried on, *and the receipts from* and expenditures for, and on account of, each department of business, or for the improvement of the premises.

From a cursory reading of the above paragraph, it is apparent that the Legislature intended that such places as Houses of Correction should employ the prisoners in the improvement or production of salable commodities and that the superintendents and inspectors of such Houses of Correction should give an account of the receipts derived from the carrying on of such business and the expenditures necessarily made therein.

From the foregoing section, read in conjunction with Section 13 of Chap. 67, above referred to, I am of the opinion that the products of the House of Correction can be placed upon the market and the receipts therefrom accounted for.

My attention has been called to a class of work to which the inmates of the House of Correction have been in the past, and are at the present employed; *i. e.*, the overhauling and repairing of various articles belonging to the City of Chicago and collected at various times from the departments of the city government and transported to the House of Correction, where I am informed they are repaired and made serviceable again. I am not informed as to the disposition of these articles after they have been so redeemed, but if they are sold or disposed of to the public, they then come within the last above mentioned portion of this opinion. They can lawfully

be disposed of and the receipts derived therefrom accounted for as required of articles produced or manufactured by the inmates of the House of Correction.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Liability for Books Destroyed by Board of Health.

September 12, 1917.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

Your communication of recent date relative to the legal liability of the City of Chicago for books destroyed by the Board of Health acting under the rules of the State Board of Health, has been referred to me for attention.

In reply thereto I beg to state that the second section of the State Board of Health Act, Chap. 126a, Hurd's Revised Statutes 1915-16, provides that:

"* * * The board shall have authority to make such rules and regulations * * * as they may from time to time deem necessary for the preservation and improvement of the public health * * * It shall be the duty of all local boards of health, health authorities and officers * * * of the state or any county, village, state or township thereof, to enforce the rules and regulations that may be adopted by the State Board of Health."

Under the above authority the State Board of Health adopted rules and regulations relative to the contagious disease known as diphtheria, of which you furnished us a copy, and the same were in force and effect throughout the State of Illinois from and after the 16th day of February, 1915.

In paragraph 2 of Section 9 as printed in the pamphlet form transmitted herewith the following language is used:

"Books, toys and other similar articles used to amuse the patient are best disposed of by burning. Under no

circumstances should borrowed toys or books be returned. *Library and school books* must not be returned. They must be burned."

This rule of the State Board relative to contagious diseases is a reasonable exercise of the authority granted in the State Board of Health Act, and the health authorities of the City of Chicago are compelled by the same act to take notice thereof and to enforce the said rule. The city authorities have no option in the matter and whenever library books are found in homes where there has been diphtheria, the books cannot be sent back to the Chicago Public Library, but must be destroyed by *burning* in accordance with the rule. We are not informed as to what other contagious diseases this rule applies to, but believe that the same rule appertains to all contagious diseases alike. From the foregoing we are of the opinion that the rule is a reasonable rule of the State Board of Health, and that your department acting thereunder in the destruction of library books incurs no liability whatsoever.

Yours truly,
DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Prohibited Noises.

September 22, 1917.

HON. WILLIS O. NANCE, Chairman, Committee on Health,
Chicago.

Dear Sir:

You referred to this department, a letter addressed to you from Mrs. Ruth Coccoaro, 1736 Prairie avenue, asking several questions regarding ordinances, etc., with the request that we answer said questions.

Mrs. Coccoaro states that the police of her district have informed her that there is a separate law covering grind

organs, which they say may play from 9 A. M. to 9 P. M. The question therefore is whether the law in reference to the calling of wares by peddlers applies to grind organs.

Section 2008 of The Chicago Code of 1911, reads as follows:

“No person shall make, or cause, permit or allow to be made upon a public street or in such close proximity to a public street as to be distinctly and loudly audible upon such public street, any noise of any kind by crying, calling or shouting or by means of any whistle, rattle, bell, gong, clapper, hammer, drum, horn, hand-organ, mechanically operated piano, other musical instrument, or similar mechanical device or wind instrument for the purpose of advertising any goods, wares or merchandise, or of attracting attention or inviting the patronage of any person to any business whatsoever: Provided, that the said restrictions shall not apply to any public alley in the city between the hours of 11 A. M. and 6 P. M.”

Section 2011 of said Code of 1911 reads as follows:

“No person shall use or perform with any hand organ or other musical instrument or device for pay or in expectation of payment, in any of the streets or public places in the city before nine o'clock A. M. or after nine o'clock P. M. of each day, under a penalty of not less than ten dollars nor more than twenty-five dollars for each offense.”

Section 2008 was passed by the City Council with the view principally of prohibiting the making of any noise or racket in attracting the attention or in inviting the patronage of persons to any business for the purpose of advertising, and was intended to apply to hand organs and musical instruments only when they are used for such purposes.

Playing of hand organs and musical instruments on public streets in the expectation of payment is not a business in the sense the word is used in Section 2008. Therefore the two sections do not conflict in any way.

In answer to the question Mrs. Coccoaro raises about the noise of auto-trucks, etc., we suggest that she should refer this matter to the Committee on Health of the City Council, by giving it such information of existing conditions as she has,

so that the committee may determine whether a nuisance exists.

As to the question whether motorcycles are allowed on boulevards we beg to say that the commissioners of the respective park boards in the city are given the power under the statute to pass all ordinances and regulations affecting the travel and use of vehicles on boulevards and within parks, and these commissioners permit the use of motorcycles on boulevards..

We return herewith letter of Mrs. Ruth Coccoaro.

Yours very truly,

EMANUEL ELLER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Compulsory Vaccination.

September 24, 1917.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health,
Chicago.

Dear Sir:

We are in receipt of your letters of the 18th and 20th inst. in which you inquire as to your right to compel the vaccination of pupils of the Douglas School, owing to the fact that three cases of smallpox in the eruptive stage were found there last week.

The immediate cause of referring the matter to this department arises from the protests of one R. A. C. Jenkins, who states, in letters written to you and to the city superintendent of schools which are attached to your communication, that his son, Robert Jenkins, was forcibly vaccinated against his will and over his protest. You state in your letter that of the nine hundred pupils in the school three hundred were found to be unvaccinated, that if any objected to vaccination they were sent home and quarantined at home, and that none of the vaccinators knows of this case. There is no occa-

sion at the present time, therefore, to go into the question of the rights of this particular individual, and we shall undertake to answer only the question propounded by you.

The ordinances of the city (Sections 1201, 1202, Chicago Code of 1911) give the commissioner of health authority to compel vaccination of persons in order to prevent the spread of smallpox, and to enter school houses and other places where persons congregate in large numbers for the purpose of vaccinating such persons where in his opinion and belief smallpox is epidemic or when it shall have come to his knowledge that a person infected with the disease or who has been exposed thereto has recently been there, provided that any such person may exercise the option of being vaccinated by his own physician.

It will thus be noted that the right to require the pupils of the school to be vaccinated under the circumstances mentioned is expressly given by ordinance. We are of the opinion that the ordinances in question are valid and may be enforced if there is no abuse of discretion.

The powers of the commissioner of health in the matter of vaccination forms the subject of an opinion written in this department on January 3, 1908, which appears in the volume of opinions covering the period from April 15, 1907, to December 31, 1908, compiled by former Corporation Counsel Brundage. We respectfully refer to that opinion as containing much information that may be valuable to you, although written before the decision in the case of *People ex rel. Jenkins*, of which we speak below.

Our Supreme Court has repeatedly held that in the absence of a present or threatened epidemic of smallpox a child that is not vaccinated cannot be excluded from the public schools.

Potts v. Breen, 167 Ill. 67.

Lawbaugh v. Board of Education, 177 Ill. 572.

People ex rel. Jenkins v. Board of Education, 234 Ill. 422.

By reason of these decisions the impression seems to have gone forth generally that the courts of this state have ren-

dered the health officers powerless to compel vaccination. Such is not the case, however. There is enough said in each of these cases to warrant the inference that if there is immediate danger of the spread of smallpox the extraordinary power given in the ordinances in question may be lawfully exercised.

In the last of the above mentioned cases the decision hinged on the validity of an ordinance designated as Section 1255 which prohibited a child from attending school who had not been vaccinated within seven years, and the court held that ordinance invalid. But it was careful to point out that the attempted exercise of power was not under certain ordinances similar to the ones in question then in force, which the court did not pass on but which inferentially were approved by the court. To make our point clear we quote the following excerpts from the opinion of the court:

“The general police powers above enumerated to pass ordinances and make regulations for the promotion of health or the suppression of disease do not include the passage of such an ordinance as this, which makes vaccination a condition precedent to the right to an education. An ordinance passed by reason of such authority must be reasonable in its character and rest upon the ground that it is a necessary means of preserving the public health.

• • •

“The only other section of the ordinance which has any relation to schools, or which purports to give any authority respecting them to the health commissioner or Health Department, is Section 1253, and it does not purport to give any authority to exclude children from schools. It provides that the commissioner of health, or any officer of the Health Department designated and authorized to act by such commissioner, shall have power to enter any of certain enumerated buildings and places, among which are school houses, under certain circumstances, and that such commissioner or officer shall have power to vaccinate any person found in such building or place whom he shall deem it necessary or advisable to vaccinate. It further purports to authorize the commissioner, at any time when smallpox is prevalent or an epidemic of smallpox is or appears to be imminent, to vaccinate any person in the city whom he shall deem it necessary or advisable to vaccinate, provided that such

person may be vaccinated by his own physician in a manner satisfactory to the commissioner. Although this section is set out at length in the answer, it is not alleged that the commissioner was attempting to vaccinate the relator, and no justification under its provisions is attempted. * * *

"These provisions of the ordinance are the only ones that could in any event have any relation to attendance upon the public schools, and the only one that was enforced against the relator was Section 1255, which is null and void. * * *

"There is nothing in the nature of an emergency in the occasional recurrence of the well known disease of smallpox in a city like Chicago which may not be provided for by general rules and regulations prescribed by the legislative authority of the city. The Board of Education, which has charge of the public schools, has made no rule or regulation on the subject of such epidemics, and neither has the City Council. The answer does not make known any ordinance, rule or regulation for the exclusion from the schools of children not vaccinated in the event that an epidemic of smallpox exists in the vicinity of a school or is reasonably apprehended, and in our opinion the court erred in overruling the demurrer."

People ex rel. Jenkins v. Board of Education, 234 Ill. 422.

From the above it will be seen that the Supreme Court has considered similar ordinances to those now in force, and that, while it did not pass squarely on their validity, it indicated strongly that if there was danger of the spread of this dread disease the use of such an extreme measure as forcible vaccination was not beyond a reasonable exercise of the police power. In fact, in the absence of an adverse decision in our state, we believe it is safe to say that this exercise of power will not be condemned by the judiciary of our own state in the face of the strong decision of the U. S. Supreme Court in *Jacobson v. Massachusetts*, 197 U. S. 11.

In that case Justice Harlan, who delivered the opinion of the court, used the following language, which is directly in point:

"We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is

prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state."

Jacobson v. Mass. 197 U. S. 11-37.

The argument is often used that if vaccination is effective the persons who believe in its efficacy can escape the consequences of exposure by causing their own vaccination without interfering with the wishes of those who object to it. This argument is negatived by the fact that one-third of the pupils in this school were not vaccinated when the danger was discovered. This proportion may exist throughout the city, and consequently one unvaccinated person who contracts the disease may become a menace to thousands with whom he comes in contact.

It is our opinion, therefore, that when the health authorities discover smallpox to the extent of three cases in an eruptive stage in one school they are acting within their powers when they enforce the ordinances requiring vaccination. We recommend a conservative policy in this respect and believe you followed the proper course in sending those home who objected to vaccination. But if the occasion should arise where under similar circumstances you deem it necessary to compel a person to be vaccinated you would be within your rights to do it.

We return herewith two letters from Mr. Jenkins and letter of the Superintendent of Schools.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Classification of Resthaven.

September 21, 1917.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.

Dear Sir:

In reply to your communication as to the classification of the institution known as Resthaven, 3360 South Park avenue, I have the honor to give the following opinion:

Prior to March 12, 1917, the City of Chicago regulated only what were then termed nurseries for the care of children under the age of three years received for periods longer than twenty-four hours.

The ordinance defined a public nursery in the following words, in Section 1227 of The Chicago Code of 1911:

“For the purpose of this article a public nursery is defined as a place where infants are received and retained for hire or reward, while under the age of three years, for nursing and maintaining apart from their parents for a longer period than twenty-four hours.”

This ordinance regulating nurseries was amended on March 12, 1917, and under the definition of “home” the scope of the section was considerably broadened. Any place or institution which receives and retains three or more dependent persons without regard to age or sex for periods longer than twenty-four hours, not otherwise provided for by law, is brought within its scope.

Said ordinance now reads as follows:

“A home is hereby defined to mean any institution, place or family used for the reception or care for a longer period than twenty-four hours of three or more infants or children apart from their parents. A home is further defined to mean any institution used for the reception or care of persons who are dependent or not capable of properly caring for themselves, homes for the aged or infirm, orphan asylums, half orphan asylums, refuges and shelters; also boarding homes caring for three or more women with their children.”

From your inspection the Resthaven at 3360 South Park avenue, is a charitable institution for the reception and care of women who have been discharged from Michael Reese and other hospitals as cured, but who are unable to resume their work and need nourishing food. It is disclosed that no treatments are given at the Resthaven.

The same question involved in this case was considered and an opinion rendered in the classification of the Co-operative League of Chicago, 4206 Ellis avenue, where working mothers were received with their children. Although the facts are different, women with their children being involved in the case of the league and apparently women without children in the Resthaven case, the principles which determine the classification under the present ordinance are the same in both cases, and the opinion rendered in that case applies in this.

Under the present ordinance, it is immaterial whether the persons received are male or female, infants, children or adults, for hire or for charity; if as many as three or more dependent persons are received and retained for longer than twenty-four hours, and such place does not come within the definition of a hospital and is not otherwise classified under the law, the place or institution so receiving and retaining such persons falls within the definition of a home.

In the Resthaven case it is clear that it comes within the plain language of the ordinance as being a place or institution “used for the reception or care of persons who are dependent or not capable of properly caring for themselves.”

The Resthaven, therefore, should have a license and other-

wise conform to the ordinance of Chicago defining and regulating homes.

Very truly yours,
 GEORGE W. ELLIS,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Interpretation of Coal Contracts.

September 20, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication in reference to certain specifications contained in the contracts for coal for the various pumping stations and other municipal plants, contained in Section 10 of said contracts, which provides as follows:

“MINER’S WAGE SCALE AND FREIGHT RATE:

“THAT: Should the Miner’s Wage Scale or Freight Rate during Duration of Contract or Extension of Contract be increased above or below the scale in force on day of opening of bids, there will be added to or deducted from the price bid one and one-half ($1\frac{1}{2}$) times the number of cents increase or decrease per ton corresponding to change in Miner’s Wage Scale, and the number of cents per ton increase or decrease in Freight Rate.

“THAT: Such correction due to change in the Miner’s Wage Scale or change in Freight Rate will be applied only to such coal shipped from the mines after the change in the Scale or Freight Rate has been made.

“THAT: The Contractor will furnish such information as will positively prove any change in Miner’s Wage Scale or Freight Rate after the day of opening bids.”

A provision similar to the one above referred to was heretofore treated in an opinion from this office under date of December 6, 1916, copy of which is hereto attached.

(See Opinion of Assistant Corporation Counsel H. V. Shepard, under date of December 6, 1916.)

The situation presented in your present letter is similar in all respects to the communication treated in our opinion of December 6, 1916, except that you ask whether the letters and other data submitted is such evidence as would warrant your office in paying an advance of 35c per ton. The question of paying an amount as a compromised figure was fully treated in our letter of December 6th and needs no further elaboration, so that the only question for our review and decision at this time is whether or not the data you have procured regarding the increase of miners' wages is sufficient to warrant the payment of 35c per ton.

The contract provided:

"That: The contractor will furnish such information as will positively prove any change in Miner's Wage Scale or Freight Rate after the day of opening bids."

As proof of the change in Miner's Wage you have submitted the following:

A letter from the New Erie Coal Company; they state that the excess cost averages between 35c and 42c per ton, but that they are willing to bill the coal at 35c per ton additional.

Letter from E. Puttkammer Coal Company, states that the coal shipped by them is known as number four and five and is mined in the State of Indiana, but when this source is inadequate they ship the coal from Illinois. In another letter they state that they will accept 35c per net ton and waive one and one-half per cent according to the contract.

Letter from Bickett Coal and Coke Company, says that it is impossible from its records to determine the exact increase due to the wage scale, that the cost varies from day to day and as near as they can figure it is between twenty-five and thirty cents per ton. That they are willing to settle their claim on the basis of thirty-five cents per ton and waive one and one-half times the actual increased cost. The foregoing letters contained all that was offered by the contractors in proof of the increase of miner's wages.

In addition to the data furnished by the contractors, you state that you have procured on your own account letters

from Illinois Coal Operators Association under date of August 20 and 25, 1917, in which they state that the minimum fair advance that should be allowed should be twenty-five cents per ton on all contracts; that this will not cover the total labor cost advance from all fields, especially Grundy County, but averaged on all movements would be approximately fair. They also refer to an article in "The Black Diamond," a publication devoted to the coal mining interests, which contains an account of the hearing had by the Federal Trade Commission in Chicago in the early days of last May.

Mr. Honnold, writing for the Illinois Coal Operators Association, summarizes the data contained in the report to the Federal Trade Commission's Coal Inquiry, and finds that it is not possible from that information to determine the exact increase in labor cost per ton.

Mr. George H. Cushing, editor of the "Black Diamond," states "that it is very hard to strike an average out-of-pocket cost that would be fair because the wage payments differ so much with the different mines. With this reservation in mind, and answering directly the technical question raised in the three questions quoted in your letter, I would say that the wage cost involved in the New York agreement of April 15th, in the most favored districts in Illinois and Indiana is about thirty cents a ton. Other districts having more difficult conditions will have to pay more."

The pamphlets showing the agreement between the Illinois Coal Operators Association of the fifth and ninth districts of Illinois and the Central Illinois Coal Operators Association and the United Mine Workers of America, district number twelve, entered into March 9, 1916, and the pamphlet showing the agreement entered into on April 17, 1917, indicate an increase in miner's wages, but just how this increase would affect the cost of mining coal per ton would have to be determined by a man experienced in the coal mining industry.

From all this data it is apparent that there was an increase in miners' wages, effective April 16, 1917.

This date we assume, was subsequent to the date of opening bids, and under the terms of the contract (a copy of which

was submitted with your letter) the city has agreed to pay one and one-half times the number of cents increase in miner's wages per ton for all coal delivered on and after the date of increase. The contract casts upon you the duty of requiring the contractors to produce such information as will positively prove any change in miner's wage scale freight rate after the day of opening bids.

The term "positive testimony" has been defined as follows in Vol. 6, Words and Phrases, page 5463:

"POSITIVE TESTIMONY.

"The terms 'direct or positive testimony' are used to designate the testimony of those who speak of their own actual and personal knowledge of the fact in controversy. The proof in such case rests upon faith in the veracity, impartiality, opportunity for observation, accuracy of memory, etc., of the witnesses. The proof applies immediately to the *factum probandum*, without any intervening process. *State v. Miller*, 32 Atl. 137, 141, 9 Houst. (Del.) 564."

The evidence required by the foregoing definition should be at hand when you determine the increased price to be allowed under the contracts, whether it is obtained wholly from the contractors or part from them and part from other sources. If the information you have obtained from sources other than from the contractors is trustworthy and confirms the statements made by the contractors as to the increase in miner's wages, subsequent to the opening of bids, and taken as a whole shows the increased cost to be more than 25 cents per ton, which price, according to the specifications, is to be computed by one and one-half times, or $37\frac{1}{2}$ cents on which the contractors are willing to compromise to 35 cents, we see no valid legal objection to the payment at the compromise figure.

The matter of the validity of agreeing on a compromise price is fully covered in our opinion of December 6, 1916, and shown herein and states the law fully on that proposition.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Commissioner of Public Welfare.

September 25, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

On the 20th day of September, 1917, the Municipal Court, acting through Judge Wells M. Cook, rendered judgment in favor of Louise Osborn Rowe for \$2,500 on account of her salary as commissioner of the Department of Public Welfare.

As you know, her office has never been abolished, but the council made no appropriation for her salary in the appropriation bill for 1917. However, at the time she was appointed and qualified, the salary attached to the office was \$5,000.

Section 15 or Article VI of Chapter 24 of the Revised Statutes (Cities and Villages Act) reads as follows:

“All other officers may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed, such fees or compensation shall not be increased or diminished to take effect during the term for which any such officer was elected or appointed; and every such officer shall make and return to the mayor, or president of the board of trustees, a semi-annual report, verified by affidavit, of all such fees and emoluments received by him.”

In *Marquis v. City of Santa Ana*, 103 Cal., the court, in holding that a municipal officer was entitled to recover his salary, used the following language, on page 667:

“But, whether the duties have been increased or diminished, or entirely dispensed with, so long as the office remains the salary affixed thereto is an incident of the office, and must be paid to the incumbent. We have, however, seen that the office has not been abolished, and the appellant does not contend that, if the office is still in existence, the respondent is not its incumbent. It follows that he is entitled to the salary attached to the office at the time of his election, and that the action of the court in holding this defense to be unavailing was correct.”

In *II McQuillin, Municipal Corporations*, Sec. 529, page 1149, it is said:

“Many state constitutions, charters and laws forbid, in express terms, the increase or reduction of salaries or compensation of officers during the term for which they were elected or appointed, and evasion of such laws is not permitted by the courts.”

In *County of Cook v. Sennott*, 136 Ill. 314, the Supreme Court of Illinois, in holding that the compensation of the clerk of the Probate Court of Cook County could not be increased during his term of office, said, on page 316:

“The Legislature was prohibited by the foregoing section of the constitution from interfering with that salary during his term. The fact that the office was created by statute, and not by the constitution, can make no difference. The constitutional provision applies to all municipal officers who are elected or appointed for a definite term of office.”

The provision of the constitution referred to by the court is Section 11 of Article IX, which, so far as is now material, reads as follows:

“The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office shall be increased or diminished during such term.”

In view of the foregoing, it seems to us that the judgment rendered by Judge Cook is sound and that it would be a waste of time and expense for the city to appeal therefrom, and we will not prosecute an appeal from such judgment unless you or the Finance Committee, or the City Council, indicates to us a desire that such appeal should be prosecuted.

Yours very truly,

CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Removal of Ashes and Rubbish Upon Vacation of Premises.

October 2, 1917.

MR. WARREN MCGINNIS, St. Louis Real Estate Exchange.

Dear Sir:

We are in receipt of your letter, dated April 28, 1917, in reference to an ordinance requiring tenants or owners vacating property to remove the ashes, rubbish, etc., and to place the property in a sanitary condition.

As you state in your letter, Chicago has an ordinance of this kind (The Chicago Code of 1911, Section 1004a), and we do not question its validity. It has been recently held by the Supreme Court that it is primarily the duty of the owner of the property in a city, and one which he may be compelled to perform, to remove at his own expense, garbage, ashes, and waste, from such property. (*The People ex rel. Webster v. City of Chicago*, 272 Ill. 451, 457; *California Reduction Company v. Sanitary Reduction Works*, 199 U. S. 306.)

We believe that these authorities fully sustain an ordinance such as that to which you refer.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Amendment of Code as to Accounting.

October 9, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

The writer has had under consideration with your Mr. Foote and Mr. Senfield of the efficiency staff of the Finance Committee the proposed ordinance amending Article IV of Chapter IV of The Chicago Code of 1911. This article deals with the manner in which the municipal accounts shall be kept.

It is represented to us that it is highly desirable that the City Council should take action in this matter at once, because it is the intention to prepare the estimates of the departments and to frame the appropriation bill along the lines indicated.

Having this in mind, we have prepared a new draft of the ordinance after making such changes as we deem necessary in order to make the proposed plan conform to the law as we understand it. But we beg to call your attention to the fact that there is now pending in the Supreme Court of the state certain litigation, the decision of which may involve a change in method from that contemplated by this ordinance.

Among the changes outlined is one by which appropriations are to be made for certain groups of expenditures within the limitations imposed by the ordinance, which segregates these groups. The intention is to have this apply to only such departments, bureaus, etc., as have small appropriations aside from salaries.

Our present understanding of the law is that this can be done as proposed. But this is one of the points at issue in the litigation we speak of. We see no reason for delaying the work of preparing the estimates for the budget, since it would require only a little time to change the items in question if the court holds that appropriations cannot be made in this way.

We find it necessary, however, to advise against making appropriations for the groups by their numbers or by titles arbitrarily designated. To this end we have slightly altered the headings so that they will indicate the general character of the expenditures in each group. If these headings are used, instead of indicating the same by number as was proposed, the appropriations will be good unless the decisions which we expect in December change our interpretation of the law.

In our opinion it is entirely proper to insert a general provision in the appropriation ordinance requiring the expenditures to be accounted for in a certain way fixed by general ordinance or even fixed by an authorized manual. But the appropriations themselves must express the object or pur-

pose of each without making it necessary to refer to other ordinances or to books or manuals. It must be complete in itself. Thus, it would be proper to appropriate for "Expenses for operation and administration" for a given department or bureau, but the requirements of the law would not be met if an appropriation reads "For expenses under Division 2," even though what you have designated as "Division 2" by another ordinance is made to include or comprehend the very thing intended by the appropriation.

We forward herewith the revised ordinance as prepared by us.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

**Appropriation for Furniture, Fittings, Etc., and for
Printing Etc.**

October 4, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You have submitted to us the question whether the city comptroller has authority under the law to transfer appropriations for certain supplies from one department to another where the City Council apparently intended to have him exercise such power, but the statute seems to stand in the way.

In the annual appropriation bill for 1917 (Council Journal, pp. 3197-3199), there is a series of items designed for the purchase of furniture, fittings, fixtures and library, and another for printing, stationery and office supplies. In each case the ordinance provides that the expenditures should be made under the direction of the comptroller in accordance with the schedule specifying the amount to be expended in each separate department or bureau.

On June 25, 1917, the City Council passed another ordinance (Council Journal, p. 708), in which it is provided that the comptroller should administer these appropriations in such a way as to meet the needs of each of the departments or bureaus thus appropriated for without exceeding the total of these appropriations.

The intention of the City Council in the original ordinance if it were not for this subsequent enactment, would have been construed as not contemplating transfers from one department to another. The later ordinance seems to indicate that it was the purpose to appropriate a lump sum which could be divided among the various departments, bureaus, etc., at the discretion of the city comptroller, although it is questionable whether such a construction is permissible even now because that would be an interpretation in conflict with the plain provisions of the statute. The appropriations having been made for the separate departments and bureaus, we are constrained to hold that the City Council has prevented the transfers which it later undertook to authorize.

The City Council has the right to appropriate for a given purpose for all the different branches of the city government in one item, but when it undertakes to split up such an appropriation among these branches and specifies the amount to be expended for the given purpose in each branch it has in fact made separate appropriations for each of the branches of the government.

This view is borne out by the decision of our Supreme Court in *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 312. It was held in that case that an appropriation for "court expenses, bailiffs and jurors, \$15,000," was valid, although attacked on the ground that it was not itemized and therefore not sufficiently specific. The court said:

"Manifestly, it was never intended that taxes could not be legally levied without an itemized list of all the detailed purposes for which such tax was to be used. * * * One of the purposes for which county taxes are levied is to defray the expenses of the courts. This is a legitimate county charge. When a levy is made for court expenses the taxpayer is afforded full information

in respect to the purposes for which the tax is levied. It is true that the county board might subdivide this purpose into all of the various items that fall under the designation of 'court expenses.' Thus, a sum might be levied for jury fees, another for bailiff fees, another for stenographer fees, another for foreign witness fees, etc., but, after all, the taxpayer would have no useful information. All these items would still be 'court expenses,' and the taxpayer could not object to the taxes because the amounts levied for the different items were too small or too large."

The case of *C., I. & W. Ry. Co. v. People*, 207 Ill. 566-573, is also authority for saying that the appropriation may be made either in specific amounts or as a total for a given purpose.

Thus, it will be seen that the separate items are to be regarded as appropriations where there is such an itemization as in the present instance. This being so, it follows that they are subject to the limitations imposed by Section 2a of Article VII of the Cities and Villages Act, which authorizes transfers of appropriations "within the department or other separate agencies of the municipal government" after the first six months of the fiscal year.

The authority to make such transfers cannot be extended so as to permit transfers from one department to another, but we believe it is elastic enough to permit a transfer from one bureau to another in the same department, since the department is under the same general executive head.

It is our opinion, therefore, that although the City Council may have intended that such transfers should be made, the attempted exercise of such authority, if that was the purpose of the ordinance of June 25th, would be contrary to statute not only because such transfers would be unlawful but also because it is a general delegation of authority to the comptroller.

We also call attention to the fact that the statute contemplates that transfers can be made by council action only after the first half of the fiscal year. Consequently authority will have to be obtained for such transfers as are permissible by means of orders or ordinances passed after July 1st. In

other words, the ordinance of June 25th does not give authority to make any transfers, and in case such transfers are desirable even within the same department they will have to be provided for by council action which transfers specific sums.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Right of City to Charge for Dancing in City Parks, Etc.

October 8, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We acknowledge receipt of your letter of September 24, 1917, in which you state that the Bureau of Parks, Public Playgrounds and Bathing Beaches will conduct during the winter a neighborhood center at the Clarendon Municipal Bathing Beach building and that one of the activities will be dancing and you request us to furnish an opinion as to whether or not the city has the right to make a nominal charge to the patrons of the dance floor.

We are of the opinion that the city has such right under recent act entitled, "An Act to enable cities of over five hundred thousand (500,000) inhabitants to provide for and conduct public exhibitions, concerts, entertainments and celebrations and to provide for the payment of the cost and expense of the same," approved and in force July 1, 1917, said act reads as follows:

"Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That the City Council of all cities of over five hundred thousand (500,000) inhabitants shall have power and authority to order and direct that any city official may provide for or enter into any contract with any person or persons, firms or corporations, for the purpose of arranging

for the holding or giving of any general public exhibitions, concerts, dances, entertainments or celebrations, or on any pier owned or controlled by said city extending out into any lake or harbor adjacent to said city, and to provide for the payment of any expense necessarily incurred in the contracting for holding or giving of the same out of the miscellaneous receipts of such city not otherwise appropriated for."

Very truly yours,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Transfer of Funds.

October 10, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of a letter from the auditor with papers attached thereto relating to a request of the commissioner of public works for the making of a transfer of fourteen thousand dollars appropriated for the Bureau of Parks, Public Playgrounds and Beaches to the Bureau of Sewers.

Our attention is called to the fact that both of said bureaus are under the supervision of the commissioner of public works, but that there is some doubt in the auditor's mind as to whether the comptroller can legally approve such a transfer. In our opinion such a transfer of funds is entirely proper, and within the power of the City Council if two-thirds of all the members concur therein. The section of the statute governing transfers of this kind was added to the Cities and Villages Act in December, 1915. It reads as follows:

"§ 2a. The city council of cities, and board of trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal gov-

ernment, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose.”

(Hurd's Rev. St. 1915-1916, p. 314.)

We have heretofore construed this section so that transfers may be legally made from one bureau to another in a department of the city government where the department head controls both bureaus. Such an interpretation is warranted by the language of the statute. We see no reason why the executive officers of the city should themselves undertake to limit such transfers to any greater extent than is necessary under a strict construction of the language used.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Right of Directors of Chicago Public Library to Purchase Land.

October 8, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of September 21, 1917, relative to the right of the Board of Directors of the Chicago Public Library to purchase land without first obtaining the approval of the City Council. Section 5 of Chapter 81 of “An Act to authorize cities, incorporated towns and townships to establish and maintain free public libraries and reading rooms,” approved and in force March 7, 1872, provides as follows:

“5. ORGANIZATION—POWERS OF DIRECTORS—FUNDS.)

§ 5. Said directors shall, immediately after appointment, meet and organize by the election of one of their number president, and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regulations for their own guidance and for the government of the library and reading

room as may be expedient, not inconsistent with this act. They shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose: *Provided*, that all moneys received for such library shall be deposited in the treasury of said city to the credit of the library fund, and shall be kept separate and apart from other moneys of such city, and drawn upon by the proper officers of said library, upon the properly authenticated vouchers of the library board. Said board shall have power to purchase or lease grounds, to occupy, lease or erect an appropriate building or buildings for the use of said library; shall have power to appoint a suitable librarian and necessary assistants, and fix their compensation, and shall also have power to remove such appointees; and shall, in general, carry out the spirit and intent of this act, in establishing and maintaining a public library and reading room."

We construe the above section to give the board power to purchase land for a library without asking for or obtaining the approval of the City Council.

Very truly yours,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Removal of Switch Tracks on Malta Street.

October 4, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Your letter of August 22d, stating that on March 12, 1917 (Council Journal, p. 3705), the City Council passed an order directing the commissioner of public works to require the C. R. I. & P. Ry. Co. to remove switch tracks on Malta street, has been referred to the undersigned for attention.

Malta street begins at and crosses 103d street and termi-

nates at about 99th street. This territory, before annexation to Chicago (in 1892), was part of Washington Heights. 103d street before annexation was called Tracey avenue. On August 3, 1885, the board of trustees of the Village of Washington Heights regularly met and the following proceedings appear in their record:

“A meeting of the Board of Trustees of the Village of Washington Heights, held August 3, 1885, Mr. R. J. Mershon on behalf of the Chicago, Rock Island and Pacific Ry. Co., said that the president of the board of trustees would grant said company the right to maintain their railway on a portion parcel of land situated between Tracey avenue and Vincennes avenue and between the right-of-way of the P., St. L. & C. Ry. and the switch track now used by the C., R. I. & P. Ry. Company, said company would in consideration of same, build a twenty-four (24) inch tile sewer connecting with the sewer on Vincennes avenue on the within described land at their own expense.

“A motion of Mr. Kay and seconded by Mr. Greenacre, the following was adopted: **RESOLVED:** At the request of the C., R. I. & P. Ry. Co., for the privilege of maintaining a railway track on the parcel of land situated on Tracey avenue and Vincennes avenue between the right-of-way of the P., St. L. & C. Ry. Company and the switch track now used by the C., R. I. & P. Ry. Co., be granted, provided said company will build at their own expense, a sewer not less than twenty-four (24) inches in diameter in connection with the sewer on the west side of Vincennes avenue.

“The vote was as follows: Yeas—6, Nays—0.

“Those voting yea were Messrs:

“Key

“Landeck

“McNabb

“Semmler

“Gascoigne, President

None voted nay.

O. F. HEDRICH,

Village Clerk.

“Record Book #2

“Village of Washington Heights.”

It was neither contemplated nor intended that this informal grant should extend north of Tracey avenue (now 103d

street) ; but counsel for the railway company gives the resolution a different and broader interpretation and contends that the alleged grant extends as far north as 101st street at which street the switch tracks in question terminate. The property owners hold otherwise ; hence the controversy and council order.

To show more clearly the location of the streets we submit herewith blue print made by the city map department.

It is quite apparent and we so hold that the resolution of the village trustees covered merely the triangular parcel of land south of 103d street and between Malta street and Vincennes road and did not extend beyond and north of 103d street.

It is true and a matter of record that three opinions of former corporation counsel, first by Wm. D. Barge, assistant corporation counsel, and approved by Edgar B. Tolman, dated December 18, 1903 ; second by Wm. D. Barge and approved by Edgar B. Tolman, dated February 2, 1904, and third by Robert J. Jampolis and approved by Edward J. Brundage, dated December 21, 1909, concede the right of the said C., R. I. & P. Ry. Co. to maintain a switch track upon the territory in dispute ; but it is equally apparent that said opinions had reference to and covered only the one switch track, laid in 1866, and running from a point on the main track of the C., R. I. & P. Ry. Co., 600 feet, more or less, south of the south line of 103d street in a northwesterly direction over and across 103d street onto land that, at the time such switch track was laid, was unsubdivided and before the Village of Washington Heights was organized and did not include the two additional tracks in Malta street.

As far back as June 7, 1886 (Record 2, p. 183), protests were made by property owners of Washington Heights against the said railway company's encroachment upon the said street and this is borne out by J. P. Foster, county surveyor, who on June 30 and July 12, 1886 (Record 2, p. 186), reported as follows : "I have surveyed the easterly line of Maple street and find that the two switch tracks near Tracey avenue are all in the street." Malta street was at that time called Maple avenue.

Therefore, allowing that the (one) main switch track of the said C., R. I. & P. Ry. Co. was laid about 1866, before territory in question was subdivided (which was the fact as shown by the record in July, 1869), we must conclude that the two additional tracks, laid after the subdivision and organization of the Village of Washington Heights and occupying a portion of Malta street, are situated there without authority of law and are therefore subject to removal by the commissioner of public works, as directed by the City Council.

The Railway Company has no right to usurp the city's street without its consent, in support of which we quote a portion of Clause 90 of Section 1, Article 5 of the Cities and Villages Act:

“The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the state, now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, and when the street or part thereof sought to be used shall be more than one mile in extent, no petition of land owners shall be valid unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile and of the fraction of a mile. * * *”

An estoppel against the city is not applicable to the matter under consideration by us. In support of our position we cite *Russell v. City of Lincoln*, 200 Ill. 511, where the court said on page 522:

“It is thought by appellant, as he is in possession of the entire street between Blocks 41 and 42, that this case may be distinguished from the cases of *City of Sullivan v. Tichenor*, 179 Ill. 97; *City of DeKalb v. Luney*, 193 Ill. 185; *Shirk v. City of Chicago*, 195 Ill. 298, and *Village of Augusta v. Tyner*, 197 Ill. 242, wherein the Statute of Limitations was held not to run when the possession only extended to a part of the street. We see no difference, in principle, whether the possession extends

to a part or to the whole of a street. A street and all its parts are held for a public use, and title to no part thereof can be obtained against the public by adverse possession. Neither does the doctrine of equitable estoppel apply here as against the appellee. * * *"

We also cite *Owen v. Village of Brookport*, 208 Ill. 35, wherein the court said, on page 51:

"In what has been said it has been assumed that the Statute of Limitations in regard to adverse possession for a period of twenty years can run against the Village of Brookport. The general rule, however, is that the Statute of Limitations does not run against municipal corporations in respect to streets or property, held for public use; and that an adverse possession of such property, no matter how long continued, is of no effect. (*Shirk v. City of Chicago*, 195 Ill. 298; *City of Sullivan v. Tichenor*, 179 *id.* 97; *Russell v. City of Lincoln*, 200 *id.* 511; *Catlett v. People*, 151 *id.* 16.) * * *"

We note your mention of the fact that the railway in question was operated by Jacob M. Dickinson, as its receiver, Upon inquiry we find that the receivership proceedings have been discontinued.

In view of the termination of the receivership we are of the opinion that you will be within your rights if you will again serve notice on the railroad company to remove these tracks coupled with notice that if such removal is not effected within a reasonable time you will take such further action as may be necessary and lawful in the premises. In case the railroad company does not heed this notice we shall be prepared to advise you further as to the lawful method of procedure.

Very truly yours,

ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTIELSON,
Corporation Counsel.

Relief of Unemployment by Department of Public Welfare.

October 13, 1917.

MRS. LOUISE OSBORNE ROWE, Commissioner of Public Welfare,
Chicago.

Dear Madam :

You have asked the question whether the Department of Public Welfare has authority to aid in the practical relief of unemployment where, incidental to the work that it may lawfully engage in, it finds opportunity to secure employment for parties desiring it.

While the Law Department has been called on several times to determine whether the city has the power to operate an employment agency, the precise question now presented has never been before us.

We have uniformly held that the city is without power to establish and maintain an employment agency. But no opinion heretofore rendered has gone so far as to say that where the officers or employes of the Department of Public Welfare, in the discharge of their duties, find opportunity to bring together persons looking for employment with those who desire to employ them, they are forbidden by law to do so. There is nothing in the law which precludes them from assisting in this way if opportunity offers in the regular course of business.

In order to make ourselves clear, we call your attention to Section 4 of the Public Welfare Ordinance. (Council Journal, March 23, 1914, pp. 4588-9.) This authorizes the Bureau of Social Surveys to collect information and data relating to the actual living conditions, facilities for recreation, causes of vagrancy, etc., in the City of Chicago. If, in the course of these duties, and incidental thereto, some relief can be afforded, the parties doing this work may report the means of relief to the department, and thereby open up the means of securing employment to such persons as may be in need of same. This would not be running an employment agency in any sense of the word, and at the same time it would tend to

promote the public welfare by reducing the causes of poverty, vagrancy and crime. Thus it may be said that the ultimate object of the work of the bureau would in a measure be attained by such incidental relief and the acts of the officers and employes of the bureau in affording it would be justified.

The City Council, under its general police power to promote the public welfare, has the right to direct that surveys of working conditions may be made. It has not the right to put persons regularly to work securing employment for applicants, but information which comes incidentally by reason of such surveys need not be ignored.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Appointment of Librarian for Public Library.

October 11, 1917.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your verbal request to be advised concerning the law governing the appointment of the librarian of the Chicago Public Library, I respectfully submit the following:

Relative to the powers of the board of directors of any library established under the provisions of such act, Section 5 of an act entitled "An Act to authorize cities, incorporated towns and townships to establish and maintain free public libraries and reading rooms," approved and in force March 7, 1872, among other things therein, provides that:

"Said board * * * shall have power to appoint a suitable librarian and necessary assistants, and fix their compensation, and shall also have power to remove such appointees."

In the year 1895, the City of Chicago adopted the provisions of an act entitled "An Act to regulate the civil service of cities," approved and in force March 20, 1895, the pro-

visions of which latter act, pertaining to the appointment and removal of city employes, undoubtedly superseded such like provisions of the aforementioned Free Public Libraries Act.

In 1909, and again in 1915, amendatory acts were enacted by the Legislature amending said Section 5 of the Free Public Libraries Act. And whether either of such latter amendatory acts operated to repeal the provisions of the Civil Service Act, in so far as the same applies to the Chicago Public Library, I would say that, because of the matters and things more fully set forth in my opinion of even date attached hereto, and for the reasons therein stated, I am of the opinion that the provisions of neither of such amendatory acts, pertaining to the appointment and removal of a librarian and necessary assistants, operated to repeal such identical provisions of said original Section 5 of the Free Public Libraries Act; nor operated to repeal such like provisions of the Civil Service Act, in so far as the application thereof applies to the Chicago Public Library. And inasmuch as it appears that under the provisions of such Free Public Libraries Act and the subsequent amendments thereto, the power to appoint a librarian and other employes of the Chicago Public Library is vested in the board of directors thereof, organized as such board in conformity with the provisions of such act; and that the Chicago Public Library is a part of the government of the City of Chicago, and the employes thereof likewise employes of the City of Chicago (*Johnson v. City of Chicago*, 258 Ill. 494); in the absence of anything in the law which would indicate that the executive head of the Chicago Public Library is other than such board of directors, I am of the further opinion that the power to appoint a librarian and all other employes of the Chicago Public Library is vested in such board of directors, to be exercised by such board, as qualified, and in the manner provided, by the provisions of the Civil Service Law.

Respectfully submitted,

HERVEY C. FOSTER,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTelson,
Corporation Counsel.

Window Shades of Billard Halls to Remain Open.

October 23, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of October 19, 1917, in which you ask our opinion relative to an ordinance passed by the City Council on December 17, 1913 (Council Proceedings of that date, page 3106), which provides in part as follows:

“All window shades, blinds or screens in any such billiard or pool room shall be raised, opened or removed at the hour of one o'clock a. m. and shall be kept raised, opened or removed until the hour of five o'clock a. m. daily, so that a free and unobstructed view of the interior of any such billiard or pool room shall be had from the street and exterior of such billiard or pool room.”

You state that a number of billiard and pool halls are located in basements, on floors above the first floor and in the rear of premises, so that a free and unobstructed view of the interior of the same cannot be had from the street; also, that some of these billiard and pool rooms have been located in such places prior to the passage of the above mentioned ordinance.

Sub-section Forty-four of Section 1 of Article V of the Cities and Villages Act reads as follows:

“Forty-fourth. To license, regulate, tax or prohibit and suppress billiard, bagatelle, pigeon-hole or any other tables or implements kept or used for a similar purpose in any place of public resort, pin alley and ball alley.”

We are of the opinion that under Sub-section 44 the City Council had the power and could legally pass the ordinance of December 17, 1913 (Council Proceedings of that date, page 3106), relative to billiard and pool rooms, and, therefore, if you find that said ordinance can not be complied with by reason of the fact that a free and unobstructed view of the interior of any such billiard or pool room can not be had from

the street and exterior of such billiard or pool room, a license for such billiard or pool room can properly be denied upon the presentation of an application for its renewal.

Yours very truly,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

County Clerk's Duties Under New Special Assessment Provisions in Local Improvement and Revenue Acts.

October 26, 1917.

HON. ROBERT M. SWEITZER, County Clerk.

Dear Sir:

Our attention has been called by Mr. Martin O'Brien, superintendent of the Tax Extension Department, to certain provisions of the statutes relating to the collection of special assessments as lately amended.

It is assumed by the members of the staff in that department that if the new laws are literally followed it will cause delay and confusion, and we have been asked to put our interpretation on these acts, since they were introduced in the Legislature at our request. We do not believe there is cause for such apprehension, and submit our views for your consideration.

The two acts in question amend Sections 68 and 72 of the Local Improvement Act and Sections 125, 129, 179, 188, 201, 203, 229 and 230 of the Revenue Act.

The purpose of the amendments is to place special assessments on the same plane as the general taxes with respect to collections, lien, forfeiture, etc. They were looked upon as the only solution of a hopeless tangle which the city and county authorities were in because of a misunderstanding as to the right of the city to withdraw special assessments from collection when it saw fit to do so.

For two years last past the city had been withdrawing

special assessments from collection when it was deemed advisable, with the result that it was unable to enforce collection afterwards, on account of the attitude of the county's officers. These officers refused to recognize the right of withdrawal, and it is stated to us that in some instances they even went so far as to refuse payment when it was tendered, and advised owners of property that they would not have to pay.

It was not intended by the new legislation to place any extra burden on the county clerk either in handling the tax warrants or in keeping his records of delinquent taxes, and we are of the opinion that a reasonable construction of the language of the acts imposes no such burden.

The ultimate intention with regard to these collections is to buy at the tax sale in all cases where there is a delinquent flat assessment and to withdraw all installments that are delinquent until the last one is due, and thereupon to buy for the whole assessment. With that end in view there was introduced, on behalf of the city, at the last session of the Legislature, a bill which provided, among other things, that if a purchaser at a tax sale suffered a special assessment to be withdrawn from collection for want of bidders at a subsequent tax sale he would forfeit his right to a deed. This provision was incorporated in an act amending the Revenue Act in other particulars, one of which was construed unconstitutional by the attorney general, with the result that the whole act was vetoed by the governor.

We are, therefore, compelled to do the best we can with the law as it now stands. You will readily see that the professional tax buyer will make no payment for delinquent special assessments on property on which he holds a certificate of sale if he knows that the collection will be withdrawn. Hence, we are practically forced to adopt the plan of forfeiting to the state in all cases where a tax buyer has such a certificate of sale and refuses to protect his purchase. For this reason we look for a large number of forfeitures at the present sale, although these will in all probability be reduced in subsequent years, especially if we secure some slight change in the law along the lines mentioned above.

Taking up first the amendment to the Local Improvement Act, it will be observed that Section 68, before amendment, provided that after making the sale for delinquent special assessments the list of lots and parcels of land sold thereat was to be returned to the office of the county clerk, where redemption could be made the same as in the case of general taxes.

The addition to Section 68 provides that a similar list of lots and parcels of land withdrawn from collection should also be returned, so that payments could be made to the county clerk in the same way. The addition to Section 72 gives the authority to withdraw and says that the withdrawal shall not operate to cancel the assessment or impair the lien, but the assessment shall remain delinquent and shall be payable at the office of the county clerk. It also authorizes a re-advertisement and sale at a subsequent tax sale.

So far as the work of the county clerk is concerned, neither of these sections contemplates any great change. The return will be the same as heretofore, except that it will indicate what was sold and what was withdrawn. The payment or redemption feature also remains the same except that in the case of property withdrawn from collection it will be simply a payment of a delinquent assessment instead of a redemption.

Hence, so far as the amendments to the Local Improvement Act are concerned, there is nothing which need be considered as requiring any radical change. There may be some work in connection with re-advertising, but if there is no provision in the law under which the fee of the county clerk can be paid this will have to be taken care of by the city through its Board of Local Improvements, which controls the situation.

As to the return to be made to the county clerk, the blanks now in use need be changed only so far as it is necessary to indicate what has been sold and what has been withdrawn. The headings on the installment warrants should include the following or other apt words, "forfeited to the state or withdrawn from collection at sale, after judgment, by the corporate authorities of the City of Chicago."

Turning now to the amendment of the several sections of the Revenue Act mentioned above, we find that the chief difficulty which you apprehend will arise from the extension of the various assessments and the penalty, fees and interest thereon in the tax, judgment, sale, redemption and forfeiture record in case of forfeiture to the state.

So far as withdrawals are concerned, all that will be necessary will be the marking of the record in such a way as to indicate that there has been a withdrawal from collection and a reference to the book and page where the amount of the delinquent special assessment appears.

Under Section 125 as amended it will only be necessary to provide that in one of the extra columns not now used you designate the withdrawals by stamping the word "withdrawn" opposite the lot or parcel of land so withdrawn, with the reference to book and page as above indicated.

Under Section 129, as amended, it will be necessary, in the case of forfeitures, to keep a separate record of special assessments where property is forfeited to the state in order that the interest, penalty, fees, etc., may be set down. It will also be necessary, in such cases, to indicate, as in the case of withdrawals, on the tax, judgment, sale, redemption and forfeiture record, the book and page of this separate record where the necessary information can be obtained, so that it will be available in case a party desires to pay and in case the warrant for the following year is to include the delinquent special assessments as contemplated under the new law.

There does not appear to be any difficulty about the amended Section 179, which now requires the same kind of notice from the county collector in the case of the return of withdrawals as in the case of the return of the special assessment in the first instance.

As to Section 188, as amended, we conceive that there might be difficulty if you attempted to keep the full record of the withdrawn items in the same book as the general taxes, but, as indicated above, we see no occasion for doing this. The amendment to Section 201 is only intended to give the authority to withdraw from collection at the sale, thus simply confirming the power given in the Local Improvement Act. Sec-

tion 203, as now amended, simply cuts out the withdrawn special assessments from the forfeiture provision, and need cause you no trouble.

Sections 229 and 230 relate to forfeited property, and what we have said above covers all the new features in these sections.

We have no doubt that you will find everything provided for in the amendments practicable if you adopt our suggestions as outlined above and do not attempt to carry the full record of the withdrawn and forfeited special assessment items on the general tax, judgment, sale, redemption and forfeiture record. It is the purpose of the city authorities to assist you in every way possible to carry out the spirit of the law as provided for in the amendments, and if experience should prove that there is any feature of these which will impose a hardship on the Tax Extension Department of your office we will be glad to lend our aid in finding a method of overcoming it even to the extent of getting the law corrected.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Appropriations from Bond Issues After the First Half of the Fiscal Year.

October 26, 1917.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We are in receipt of your letter concerning an additional appropriation from the proceeds of the street lighting bond issue, in which the question is raised whether the City Council can legally appropriate from the funds derived from such bonds after the first half of the fiscal year.

We have examined the papers attached to your letter and understand from same that it would be very greatly to

the advantage of the city if such appropriation could be made at the present time. We also have in mind that the precise question here raised has never been directly passed on by our Supreme Court, and that there is a possibility that the extreme views announced by that court with reference to the time of making appropriations in a number of cases heretofore decided may not apply to appropriations from proceeds of bond issues, especially since that court recently held that a bond ordinance in itself was in the nature of an appropriation ordinance.

Nevertheless, we are constrained to hold that the City Council has not the authority to make appropriations of this kind after the time limited by statute for the making of additional or supplemental appropriations from miscellaneous receipts has gone by.

The proviso of the statute authorizing such additional appropriations reads as follows:

“PROVIDED, HOWEVER, That in cities and villages having a population of one hundred thousand or more, the city council or board of trustees, as the case may be, may, at any time within the first half of the fiscal year, by a two-thirds vote of all the members of such body, pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of Section 1 of Article VIII of this act.”

Applying the familiar rule of construction of statutes to the effect that the inclusion of one thing implies the exclusion of others, we find that the proviso authorizes the making of additional appropriations within the first half of the fiscal year “from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of Section 1 of Article VIII,” also that there is provision made for further appropriations by the sanction of a majority of the legal voters of the city either by petition or at an election duly called therefor, and that there is provision made for ordering an improvement where the necessity of same has been caused by a casualty or accident happening after the passage of the annual appropriation bill. But there is no provision

made for any other appropriation after the first half of the fiscal year, except as above set forth. No exception is made concerning appropriations from proceeds of bond issues. We are bound, therefore, under this rule of exclusion of all that is not enumerated, to construe the statute to mean that there can be no other appropriations made after the first half of the fiscal year unless they are made either by the sanction of a majority of the legal voters of the city or are made for a public improvement the necessity for which was caused by a casualty or accident happening since the appropriation bill was passed.

It cannot be said that the bond ordinance authorizing the issue is an appropriation ordinance in the sense that the money derived from the bonds can be used without express authority to use it by a specific appropriation. Hence, such money must be appropriated before it can be used.

The Supreme Court in the case of *City of Chicago v. Nichols*, 177 Ill. 97, and again in the case of *People v. Sergel*, 269 Ill. 619, emphatically states that the provisions with respect to appropriations refer to corporate expenditures for all purposes. Such being the case it follows as a matter of course that the said provisions include appropriations which are made from the proceeds of bond issues.

If appropriations from bond issues could be made at any time, we conceive that it would be possible, in the case of bonds issued for general corporate purposes, unless they were expressly limited to the payment of indebtedness already incurred, to completely overcome the restrictions of the statute with regard to the time that appropriations should be made. That is to say, the proceeds of bonds issued for general corporate purposes could be applied to the payment of expenses under appropriations made at any time on the theory that appropriations from bond issues are not included within the restriction. We are convinced that such an interpretation of the law would not be sustained.

We are, therefore, of the opinion that appropriations from bond issues come within the same rule as appropriations from miscellaneous receipts, and that no such appropriation

can be made after the first half of the fiscal year, except in the manner provided by statute.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Right of Elevated R. R. Co. to Lease Building for Store
Purposes.**

November 1, 1917.

TO THE HONORABLE THE CITY COUNCIL
OF THE CITY OF CHICAGO.

Gentlemen:

At the meeting of the City Council held Monday, October 29, 1917, the corporation counsel was requested to submit an opinion as to the right of the Northwestern Elevated Railroad Company to lease a building upon its property at Wilson avenue and Broadway for store purposes.

Pursuant to the request of your honorable body, we beg to say that the ordinances now in force relating to the Northwestern Elevated Railroad Company contain no provisions either granting or restricting the right of the company to lease its property as it has done in this case, and we are of the opinion that the city lacks the power to pass an ordinance regulating the actions of the company in this respect where, as here, the property is private property of the company which has been acquired by purchase. A similar question was considered by this office in an opinion rendered July 29, 1908 (Opinions of the Corporation Counsel, April 15, 1907, to December 31, 1908, page 384), and the same opinion was expressed.

If the company is exceeding its charter powers by leasing its real estate for store purposes, the law is clear that the

question can be raised only in a direct proceeding instituted by the state.

Springer v. Chicago Real Estate Loan Company, 202 Ill. 17, 23.

It is not clear, however, that the company has exceeded its powers, for the Supreme Court has recognized the right of a corporation to lease its real estate in some instances, even for purposes other than those for which it was incorporated, where the property is not needed in carrying on its business, and furthermore, the Public Utilities Commission, to which, under the Public Utilities Act of 1913, all leases of corporate property must be submitted for approval, has made a ruling that

“Any public utility lawfully doing business within the State of Illinois may, and it is hereby authorized and empowered to make such leases of such portions of its real property as may not be necessary or useful in the performance of the duties of any such public utility to the public, for a term not exceeding five years except where otherwise ordered by the commission: Provided, such public utility shall first apply to this commission for a general order approving and consenting to the making of such lease.”

The Northwestern Elevated Railroad Company has obtained from the commission a general order authorizing the making of leases as required by the above ruling, and the lease of its premises at Wilson avenue and Broadway has been submitted to the commission and approved.

Our conclusion is, therefore, that the city is not in a position to question the right of the company to enter into said lease.

Very truly yours, .

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Permit for Factory on Southport Avenue.

November 2, 1917.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Your letter of recent date concerning a proposed building to be erected at No. 2662-4 and 2700-20 Southport avenue was referred to the undersigned for consideration and reply.

You state that you are unable to pass judgment on the respective rights of protesting property owners who object to the erection of the building in question, and the A. Nelson Mfg. Co., who are erecting the building, and that you have referred the entire matter to us for that reason.

It appears from your statement and documents submitted by you that on October 23, 1917, a permit was issued by your department for the erection of a one-story and basement brick factory building located at the address given above after an application for same in proper form had been submitted; that shortly after the work on the building was begun a complaint was received by your department that a machine shop was being erected on the premises without frontage consents having been obtained as required by ordinance; that thereupon the work was stopped by you, after which Mr. A. Nelson called at your office and stated the building was not to be used as a machine shop and made a written statement to this effect, saying further that he was familiar with the ordinances of the city regarding the establishment and maintenance of machine shops and declaring that there will be no violation of said ordinances upon the premises; that on the showing made and the written statement submitted the work was allowed to proceed.

It also appears that on October 29, 1917, an order was passed by the City Council directing the commissioner of buildings to at once stop all work on the erection of the above building and to keep said work stopped pending an investigation by the Committee on Buildings and City Hall as to whether the permit was issued in accordance with the provisions of the building ordinances.

The question presented, therefore, is whether you are justified in stopping the work under these circumstances, or in other words, whether you have the right to revoke a permit after it has once been issued unless you proceed according to the authority given you in the ordinances of the city.

In determining this question, we will not take into consideration whether or not the order passed by the City Council has been signed by the mayor, but will assume that the same will either be signed or that no action will be taken by the mayor so that if it can become operative it will be in effect after the next meeting of the City Council.

Under Section 230 of The Chicago Code of 1911, the commissioner of buildings is bound to issue a permit after an application has been duly made and plans in conformity with the provisions of the building ordinances have been examined and approved in the manner provided for therein. If, while the application is pending, a protest of property owners is made, the situation would be entirely different from the one that confronts you. But the permit having been issued, a revocation of same can only be made in conformity with the provisions of Section 236. That section reads in part as follows:

“If the work in, upon, or about any building or structure shall be conducted in violation of any of the provisions of this chapter, it shall be the duty of the commissioner of buildings to revoke the permit for the building or wrecking operations in connection with which such violation shall have taken place.”

Sections 203 and 205 of the Code give the commissioner of buildings power to stop work on the construction of a building, but the authority contained in those sections depends on whether such building is being constructed in violation of the provisions of the building laws or is being done in a reckless or careless manner.

The power of revocation and the power to stop work being thus expressly limited by ordinance it cannot be exercised by the commissioner simply because a protest is made even when the protest comes from the City Council itself.

There is a provision of the Code (Section 239) which op-

erates to annul the permit in case there is a departure from the approved plans, but we do not understand that there is any such question in this case.

It follows from what we have stated that in case there is no violation of the city ordinances, so far as the erection of this building is concerned, the commissioner of buildings would have no right to stop the construction of the building and possibly would render himself personally liable if he did so.

The final question to be determined then is whether there has been a violation of the building ordinances, and this question can be narrowed down to the determination of whether or not a machine shop is being constructed on the premises.

The application itself states that the building is to be a factory. There is no frontage consent requirement in the law applicable to factories in general, although there are certain kinds of factories for which frontage consents must be secured. The difficulty in this case seems to have arisen from the fact that in presenting the plans a portion of them were marked "machine shop." Since they were presented there was written alongside of these words "manufacture of small parts only." Everything else about the plans indicates that the building is to be an ordinary manufacturing building and not a machine shop. The applicant states in his application that it is to be a factory, and has since specifically certified that there is to be no machine shop conducted on the premises. Hence, while the words "machine shop" appear on the plans it would seem as though they were inadvertently used and their significance is neutralized by the other notation appearing alongside of same. It is stated to the writer that the purpose for which the building is to be used is the manufacture of certain small parts and appliances used in connection with automobiles. This does not necessarily imply that there is to be a machine shop in connection with this factory, although it may be that a factory manufacturing such parts will come within the definition of a machine shop. If it does, or in other words, if it appears after the building is constructed that it is to be used for a machine shop it is within the power

of the city authorities to prevent its use for that purpose unless the necessary frontage consents are obtained. At present no one can tell as well as the parties who made the application for the building permit whether or not it is to be used as a machine shop, and you are bound to accept the statement of the owner of the premises to the effect that it will not be used that way.

Although the question of what a machine shop is has not yet come up, by reason of the fact that you have no right to assume that there will be a machine shop there, nevertheless, for your guidance we will call your attention to what has been construed as a machine shop. Webster's International Dictionary defines a machine shop as follows:

"A workshop containing machines where machines are made, where castings are finally shaped and finished, or the like."

The Century Dictionary defines it as follows:

"A workshop in which machines or parts of machines are made and repaired."

In the case of *Hoskin v. Woodward*, 45 Pa. 42, it was held that the phrase "machine shop" as employed in a mortgage on a machine shop includes all the fixed elements that give it the peculiar character of such a shop including the lathe.

In *Goddard v. Monitor M. F. Ins. Co.*, 108 Mass. 56, it was held that a building used for the construction of organs and melodeons cannot be regarded as a machine shop, and the court indicates in the opinion that a machine shop must be construed as one in which machinery is manufactured or repaired.

There does not seem to be a judicial decision from which an absolute definition applicable in all instances can be drawn. There are authorities which hold that where machinery is used it is a question in each instance for a jury to determine from all the circumstances in the case.

We are of the opinion that a manufacturing plant can not be regarded as a machine shop unless machines are constructed or repaired. That seems to be the common acceptance of the term. When the owner has proceeded so far that he

is about to use the property the question as to whether or not he is using it for a machine shop can be more readily determined, and if such use is intended the city will have authority to prevent its occupation for that purpose unless frontage consents are obtained.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Slot Machines as Gambling Implements.

November 1, 1917.

HON. H. F. SCHUETTLER, Gen. Supt. of Police, Chicago.

Dear Sir:

We are in receipt of your inquiry of the 18th ult., as to whether or not the operation of a certain slot machine would constitute any violation of the laws and ordinances pertaining to gambling.

The machine in question is called the "Silent Salesman" and is a product of the Almy Manufacturing Company, a description of which, your letter states, was furnished to you by said company and which you in turn transmitted to this department and which is as follows:

"It is a device seven feet high and three feet wide, containing a music box and space for forty-five pictures or advertisements which move automatically; it is illuminated by electric lights and on the front of the said machine there are four glass signs on which appear the following inscriptions: "5c buys 5c worth of merchandise; 5c buys 10c worth of merchandise; 5c buys 15c worth of merchandise; 5c buys 25c worth of merchandise." One of these signs is always illuminated and on the front of the machine is a sign which reads: "No chance." The illuminated sign above the dial tells in advance the amount of merchandise check you will receive for a nickel deposited in this machine. These machines are so adjusted that the operation by which trade checks of the

value of five, ten, fifteen and twenty-five cents respectively will be received are regulated and fixed; that attached to the side of the machine is a disc and a chart *which is now a part of the machine* from which any person may ascertain and determine in advance the value of the trade checks which will be obtained upon the next or any successive number of operations of the machines; that when a nickel is inserted in an opening in the machine and a handle pressed down, it ejects into a tray a check indicating the amount of merchandise to which the person inserting the nickel is entitled; that the amount of this check is always the same as the amount indicated on the illuminated sign which made known to the person inserting the five-cent piece before he inserted the same the amount of the check he would receive, or, in other words, the purchasing value in merchandise of the check he will receive if he inserts his nickel in the machine. The merchandise checks that are ejected from the machine can not be again inserted in the machine by the intending purchasers and are not redeemable in cash, and can be used only for the purchase of merchandise, and the machine itself is operated only by the insertion of a nickel."

This same Almy Manufacturing Company placed a similar machine, called the "Automatic Cashier and Discount Machine" on the market last year and attempted to enjoin the city officials from interfering with its operation. The Appellate Court in *Almy Mfg. Co. v. City of Chicago*, 202 Ill., App. 240, in a very sweeping and far reaching opinion, held said machine to be a gambling device.

We are unable to discover any material difference in the two above-mentioned machines, except:

(1) A change in the name.

(2) A certain card that formerly hung on a hook on the front of the machine and from which many plays in advance could be figured out, is now made fast to the machine.

The Appellate Court in the above case in its opinion, beginning on page 243, says:

"It would not be much of a mechanical task to change the machine so that it would operate differently than when operated by the card, and it would take a mechanic about twenty seconds to make this change pro-

viding the machine was open, and the door of the machine could be readily opened with a key. It is a simple operation to make the machine pay differently than the directions indicate, and the machine could be easily set back to its original order without any injury to the same. It is virtually conceded that the machine without the card hung upon the brass hook is a gambling device. While the card indicates when a winning is to be made, without it all is chance.

"The 'card' is evidently intended to take the 'curse' off the machine as a gambling device, but we think it utterly fails to do so. Players may be deluded into so believing, but this court can not be. The card is movable and transitory in its nature and is not an integral part of the machine in any sense.

"The purpose of the machine, its quality and character, the possibilities of its operation and the manner in which it is susceptible of use are controlling factors in determining whether it is a gambling device in fact or not. We think the machine must be judged as to its being a gambling device or not without reference to the 'card,' because the 'card' may or may not be in sight, according to the whim, wish or desire of the operator. While it is true that the player will receive five cents in trade for the nickel which he places in the slot of the machine, yet that is not what induces the player to make the venture. It is the lure and the chance to get maybe ten, fifteen or twenty-five cents as a return for the five-cent investment. It is the lure of the game that makes it gambling. This is the attraction that incites the cupidity of the player.

"Again, the machine is not an 'automatic cashier and discount machine.' To so characterize it is simply another attempt to disguise its real character. The ease with which the mechanism can be manipulated so that it may be diverted from its apparent innocent character to that of a gambling device brings the machine within the statute and the ordinance as a gambling device. The machine gives forth nothing but a check. The check takes the place of the nickel deposited in it, therefore it does not perform the function of a cashier, because the check takes the place of the nickel and must be handed to the person who returns to the player the value of the check.

"Upon what theory the machine performs the functions of a 'discount machine' we are unable to discern either from the machine itself or anything we find in the

record. The machine is an exhibit in the case and is before us. We have examined it, operated it and tested its various capacities for good or evil, and from the record and the machine, and its manner and method of working, we are of the opinion that it is a gambling device and under the ban of the law. The machine is evidently masquerading under a false title, and is, we think, akin to a lottery in its operation, coming within the definition of the lexicographers of a lottery, which is, 'a scheme for the distribution of prizes by lot or chance'; 'a hazard in which sums are ventured for the chance of obtaining a greater value.' The hazard of small amounts to win larger is gambling. The hazard of putting five cents in the slot of this machine with a chance of winning ten, fifteen or twenty-five cents stamps it as a gambling device, and, as the evidence shows, the machine can be so manipulated that the winning of more than the amount invested is chance in which neither the will nor the skill of the operator can influence the result, which further characterizes it as a gambling device.

"A case similar to the facts and the same in principle is *Lang v. Merwin*, 99 Me. 486. This was a slot machine case, in its essence akin to the one at bar. There, as here, the playing was a nickel, the return for the nickel being a nickel cigar with a chance of winning more cigars to the amount of fifty, and the court said:

" 'In the case before us it is idle to assume, or concede, that the person putting his five cents into the machine may be doing so merely as a means or mode of buying a five cent cigar. It is idle to deny that the impelling motive is the hope of getting other cigars for nothing. If the machine did not afford that chance it would not be used. True, the cigar dealer sets up the machine to increase his trade and is recouped by that increase for any losses, so that in the end he loses nothing, but he does so by arousing and stimulating the gambling propensity, the very propensity the legislature evidently seeks to repress. The element of chance is the soul of the transaction. The operator hopes by chance to get something for nothing. The dealer hopes chance will save him from giving something for nothing. Each is pecuniarily interested adversely to the other in a result to be determined solely by chance. To use the language of the street, "it is a gamble" which will win, and we have no doubt the transaction is "gambling" in the statutory sense of the word.'

"We think the logic and the reasoning in the case *supra* are pertinently applicable to the facts of the instant case. Lot and chance are the elements of this device, which stamp it as gambling.

"In *Horner v. United States*, 147 U. S. 449, the scheme of the Austrian government to float some bonds was declared to be a lottery, and the court said:

" 'Although the transaction in question was an attempt by Austria to obtain a loan of money to be put into her treasury, it is quite evident that she undertook to assist her credit by an appeal to the cupidity of those who had money. * * * Every holder of a bond has an equal chance with the holder of every other bond of drawing one of such prizes. Whoever purchases one of the bonds, purchases a chance on a lottery, or, within the language of the statute, an 'enterprise offering prizes dependent upon lot or chance.' The element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter.'

"We therefore hold that the slot machines of complainant of the character of the one in evidence are gambling devices and are subject to be dealt with, together with the persons owning or operating the same, as directed by the ordinance of the City of Chicago and the statutes of the state, *supra*, regulating such machines.

"The interlocutory injunctive order appealed from was improvidently granted and is therefore reversed."

In applying the above reasoning to the machine in question, we note several points made by the court which we deem very pertinent in this case and which are in part as follows:

- (1) "It would not be much of a mechanical task to change the machine so that it would operate differently than when operated by the card."
- (2) "It is a simple operation to make the machine pay differently than the directions indicate."
- (3) "The 'card' is evidently intended to take the 'curse' off of the machine as a gambling device, but we think it utterly fails to do so."
- (4) "It is the lure and the chance to get maybe ten, fifteen or twenty-five cents, as a return for the five cent investment."

- (5) "It is the lure of the game that makes it gambling. This is the attraction that incites the cupidity of the player."
- (6) "The machine is not a 'Silent Salesman'. To so characterize it is simply another attempt to disguise its real character."
- (7) "The ease with which the mechanism can be manipulated so that it may be diverted from its apparent innocent character to that of a gambling device brings the machine within the statute and the ordinance as a gambling device."
- (8) "The machine gives forth (sells) nothing but a check."
- (9) "The machine is evidently masquerading under a false title and is, we think, akin to a lottery in its operation."
 - a. "A scheme for the distribution of prizes by lot or chance."
 - b. "A hazard in which sums are ventured for the chance of obtaining a greater value."
- (10) "The hazard of small amounts to win larger is gambling."
- (11) "The hazard of putting five cents in the slot of this machine with a chance of winning ten, fifteen or twenty-five cents, stamps it as a gambling device."
- (12) "Neither the will nor the skill of the operator can influence the result, which further characterizes it as a gambling device."

We are therefore of the opinion that from the rules laid down by the Appellate Court in the above opinion and from many other similar authorities, the slot machine in question called the "Silent Salesman" comes within the statute and ordinances as a gambling device and is subject to be dealt with as such.

Very truly yours,

FRANK D. AYERS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Lawful Advertisement on Motion Picture Screen.

November 3, 1917.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir :

We are in receipt of your letter dated October 23, with enclosure of a communication from the American Investment Association, in which you inquire whether the advertising plan of said association in disposing of bungalow lots at Spring Lake, Michigan, is in violation of any law or ordinance.

The communication from the American Investment Association above referred to states that the plan of advertising in question consists of showing upon the screen in moving picture theatres an advertisement reading as follows:

“Tonight we are disposing of a number of bungalow lots at Spring Lake, Michigan. Sign your name and address on ticket given you at door. You will be notified.

AMERICAN INVESTMENT ASSOCIATION.”

We believe that no objection can be made to the wording of this advertisement, since it is not so phrased as to lead one to expect that any element of chance is present in the disposition of the lots or that they may be acquired otherwise than by straight purchase.

The plan of advertising any legitimate business in moving picture theatres by the use of slides such as the one above quoted is not in violation of any statute or ordinance.

If, therefore, the enterprise which is carried on by the American Investment Association and which it desires to advertise in this way is in itself conducted in a legitimate manner, without fraud or misrepresentation and free from the practices which have in the past, in many cases, made it necessary for the Police Department to prohibit advertising of this kind as a measure of protection for the public, we believe

that the association may be permitted to advertise in moving picture theatres by the use of the slide above mentioned.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Redemption of Property Sold for Delinquent Special Assessments.

November 10, 1917.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have before us a letter from the real estate agent of the city in which he asks two questions which we will take up *seriatim* and answer. Your first question is as follows:

“The county clerk in making estimates of redemption on property sold to the city and which has been resold, does not include penalties in said estimates. Is the city entitled to penalties in said cases?”

We understand that in the above you refer to property on which the city has a live certificate of sale where no deed has been taken out, and on which there has been another sale for delinquent taxes or special assessments in a subsequent year.

There can, of course, be no question about the right of the city to penalties if the re-sale takes place the same year. (*Gage v. Parker*, 103 Ill. 528.) When a sale is made on account of delinquent taxes or special assessments in a subsequent year while a former tax buyer has a certificate of sale, such former tax buyer, if an individual, loses the penalty prescribed by statute. This is the case even though the same tax buyer buys in the property again at the subsequent sale. The effect of buying in at a subsequent sale in such case is to lengthen the period during which a party may apply for a deed, but he is entitled to the penalty only on the last

sale at which he has bought. The statute contemplates that a different rule should apply in the case of municipal corporations which bid in their own delinquent special assessments in default of other bidders. The section of the act covering the subject-matter is as follows:

“§ 211. If any purchaser of real estate sold for taxes or special assessment shall suffer the same to be forfeited to the state, *or again sold for taxes or special assessment*, before the expiration of the last day of the second annual sale thereafter, such purchaser shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale or forfeiture, during which time the land shall be subject to redemption, upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay, for the use of such first purchaser, the amount paid by him. The second purchaser, if any, shall be entitled to the redemption money, as provided for in the preceding section. *Provided, however*, it shall not be necessary for any municipal corporation which shall bid in its own delinquent special assessments, at any sale, in default of other bidders, to protect the property from subsequent forfeitures or sales, as above required in this section.”

Plainly, the intent of the statute is that the city is not required to pay the taxes and special assessments as they accrue and will be permitted to let the same go to sale without sacrificing the penalty. The language could not be more explicit.

We assume that the attitude of the county clerk with respect to this matter is based on the decision of the Supreme Court in *City of Chicago v. Gage*, 268 Ill. 232. In that case the Supreme Court held unconstitutional an amendment to Section 72 of the Local Improvement Act which provided that a municipal corporation holding a certificate of sale or tax deed acquired in pursuance of the authority given to such municipality to buy at a tax sale in default of other bidders shall be entitled to reimbursement of the amount paid by it at such sale, including the costs, and interest at the rate of five per cent, etc. The court held that a municipal corpora-

tion was in the same position as a natural person after it purchased at a tax sale and said, among other things:

“The Legislature cannot create any difference in right between individuals and corporations who see fit to pay taxes by purchasing the property at tax sales.”

It is true that this decision seems to indicate that the city has no greater right as to penalties than other tax buyers, but the decision in question was one which related to an entirely different statute and a different provision from the one in question.

We do not believe that it is within the authority of the county clerk to ignore the plain provisions of Section 211 of the Revenue Act because a provision somewhat similar in Section 72 of the Local Improvement Act was held unconstitutional. There are differences between the two which should be brought to the attention of the courts before such a rule is followed. It is quite possible that the court having due regard for the fact that the city can only bid after the property has been refused by all other tax buyers will hold that the city is in a different position in the first instance and that a classification by which it continues to be in a different position up to the time it takes out a deed is valid.

We are of the opinion, therefore, that in the absence of any decision holding that the proviso of Section 211 is unconstitutional, or that it stands on the same plane as the provision of the section of the Local Improvement Act that was held unconstitutional, the county clerk has no authority to say that there should be no penalty included in the estimate which he makes when a person undertakes to redeem his property. There is undoubtedly a close question of law involved and it may be that it will be decided against the city, but until that happens the county clerk ought to follow the statute.

Your second question is as follows:

“The county clerk in making redemptions on forfeited special assessments turns over to the county collector the amount of redemption moneys. The county collector makes a return to the city once a year. The county collector also makes one return a year on pay-

ments on withdrawn specials. Is the county collector required to make one return a year, or is he required to make return within ten days?"

The statutes fix the time when the officer collecting the tax shall pay the same over to the city authorities. Under Section 3 of Article VIII of the Cities & Villages Act it is made the duty of the officer collecting taxes levied by the city to settle with and pay over to the city treasurer "as often as once in two weeks from the time he shall commence the collection thereof, all such taxes as he shall then have collected, till the whole tax collected shall be paid over."

Section 244 of the Revenue Act reads as follows:

"§ 244. The county collector shall report and pay over the amount of tax and special assessments, due to towns, districts, cities, villages, corporations and persons, collected by him on delinquent property, at least once in every ten days, when demanded by the proper authorities or persons."

There is also another provision of the Revenue Act which requires the county collector, on or before the tenth of April, annually, to make a sworn statement showing the total amount of taxes received by him from town and district collectors and the total amount collected by himself, and to pay the same over. The Local Improvement Act requires the county authorities to proceed in the same manner with special assessments as with general taxes.

From this it will be seen that the law contemplates that there shall be payment made every two weeks while the tax is being collected, that there shall be payment made of all that is collected up to the time the property becomes delinquent, and that thereafter all delinquent taxes and special assessments which are collected shall be reported and paid over every ten days. There is no exception made with respect to moneys received when redemption is made. Neither is there any exception made in case there is a withdrawal from collection at the sale.

In our opinion the law clearly contemplates that the county collector shall make a return every ten days and pay over what he has collected.

This is a matter which has received a great deal of attention heretofore, and the writer personally has discussed it with various county collectors. It has always been insisted that the provisions of the statute cannot be complied with in so large a community as this; that it would be tantamount to requiring the county treasurer to close his office every ten days, gather his books together and make a full accounting to compel him to pay over as required by statute. The officers of the city have repeatedly stated that so strict an observance was not demanded, but the county collector retains the money an unreasonable length of time when he makes such settlements only once a year. It would seem to us that he should be able to keep his books in such shape that he could pay over moneys collected from delinquent taxes without turning his entire office upside down as he claims, and that such settlements ought to be made at least monthly, even if a settlement every ten days is impracticable. In any event, your question does not deal with the practical side of the situation but simply asks us what the law is on this point, and we have no hesitation in saying that the law is clear that after special assessments have become delinquent they remain delinquent, and the statute applicable to settlements on delinquent property is applicable at all times whether it is forfeited or whether the collection is withdrawn.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**License of the Protestant Woman's National Home for
Children.**

November 7, 1917.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

In reply to your communication as to whether the Protestant Woman's National Home for Children, 439 South Nor-

mal Parkway, Chicago, Illinois, should be required to take out a license under the ordinance of March 12, 1917, we submit the following:

Your letter discloses that it is contended that this home is licensed by the State of Illinois and therefore should not be required to obtain a license from the City of Chicago.

The ordinance now in force regulating the licensing of homes (Section 1228, page 3762, Council Proceedings March 12, 1917) provides:

“It shall be unlawful for any person, firm, association or corporation, other than the regularly constituted authorities of the United States, or any association or institution for the care of children which has been accredited, certified or licensed by the State of Illinois pursuant to an act of the Legislature to regulate the treatment and control of dependent, neglected and delinquent children, the County of Cook or the City of Chicago, to open, conduct, manage or maintain any home, as defined in this article, within the corporate limits of the city without first obtaining a license therefor as hereinafter provided.”

Section 13 of the act of the Legislature providing for the treatment, control, maintenance and adoption of children (J. & A. Stat., page 1930), is as follows:

“All associations receiving children under this act shall be subject to the same visitation, inspection and supervision by the Board of State Commissioners of Public Charities as are the public charitable institutions of this state, and it shall be the duty of the said Board of Commissioners to pass annually upon the fitness of every such association as may receive or desire to receive, children under the supervision of this act, and every such association shall annually at such time as said board shall direct, make report thereto, showing its condition, management and competency to adequately care for such children as are, or may be, committed to it, and such other facts as said board may require, and upon said board being satisfied that such association is competent and has adequate facilities to care for such children, it shall issue to the same a certificate to that effect, which certificate shall continue in force for one (1) year, unless sooner revoked by said board, and no child shall be committed to any such association which shall not have

received such a certificate within fifteen (15) months next preceding the commitment. * * *''

This section of the Juvenile Court Act authorizes expressly the State Board of Charities to issue certificates to competent associations to receive children under the supervision of the act.

Section 1228 of the ordinance requiring the licensing of homes in the City of Chicago, plainly exempts therefrom licensed homes established by the regularly constituted authorities of the United States, or any association or institution for the care of children which has been accredited, certified or licensed by the State of Illinois pursuant to an act of the Legislature to regulate the treatment and control of dependent, neglected and delinquent children, the County of Cook or the City of Chicago.

The Protestant Woman's National Home for Children on or about December 6, 1916, obtained from the State of Illinois a certificate under Section 13 of the Juvenile Court Act to receive children under the supervision thereof.

We are therefore of the opinion that the Protestant Woman's National Home for Children comes within the exemption of the ordinance of March 12, 1917, being an institution certified by the State of Illinois as designated by the ordinance, and is not required to take out a city license under the said ordinance.

Very truly yours,

GEORGE W. ELLIS,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Validity of Proposed Cabaret Ordinance.

November 14, 1917.

HON. JOHN TOMAN, Chairman, Committee on License, City Council, Chicago.

Dear Sir:

Your committee has submitted to us a proposed ordinance

designed to do away with cabarets, dancing, skating and other forms of entertainment in dramshops with a request for an opinion as to its validity and the legal effect of same if enacted.

The part of the ordinance in question which calls for extended comment reads as follows:

“No person, firm or corporation licensed under Sections 1526 to 1545, inclusive, of The Chicago Code of 1911 or such sections as amended, to conduct a saloon or dramshop, shall at such saloon or dramshop, or in connection with the offering, serving, sale, consumption or giving away of any intoxicating, malt, spirituous or vinous liquors at such saloon or dramshop, either as owner, lessee, manager, officer or agent, give, conduct, produce, present, offer, permit, suffer or allow any exhibition, show, amusement, cabaret, entertainment, act of entertainment, performance, whatsoever, whether musical, or otherwise, or any dance, or skating, either of patrons or other persons; provided, however, that in any such saloon or dramshop or place conducted therewith, and licensed under and by virtue of said sections or said sections as amended, musical selections for the entertainment of the patrons thereof may be played by a musician or musicians on some musical instrument or instruments, upon the person, firm or corporation conducting such place securing a separate permit therefor from the City of Chicago.”

The ordinance then goes on to prescribe the conditions under which a permit for the purpose of playing such musical selections may be obtained, fixes an annual fee of \$300 for same, prescribes penalties for the violation of any of the provisions of the ordinance, and repeals “all ordinances or parts of ordinances, regulating dramshops under the above and foregoing sections, inconsistent with the provisions of this ordinance.”

It will be seen from the above that the ordinance first prohibits any one licensed to conduct a saloon or dramshop under certain sections of the code from presenting or allowing practically any form of entertainment or amusement at the saloon or dramshop, and then carves out an exception by permitting instrumental music to be played by one or more

musicians at such saloon or dramshop "or place conducted therewith." Hence, it does not attempt to prohibit such entertainments and amusements at all places where liquor is sold and consumed on the premises, and it does not prohibit all forms of entertainment at saloons and dramshops. It stops short of a complete prohibition both ways.

Section 1 of Article V of the Cities and Villages Act gives to the City Council authority to "license, regulate and prohibit" the selling or giving away of liquors, and the same section of the statute undertakes to give it power to "license, tax, regulate, suppress and prohibit" theatricals and other exhibitions, shows and amusements.

The mere reading of the statute would convey the impression that the city has at least as much power with respect to entertainments and amusements as it has in the case of the liquor traffic. But our courts have held that the city authorities may prohibit the traffic in liquor altogether but they have not the right to prohibit entirely the giving of theatricals, exhibitions, shows and amusements. This distinction is due to the fact that the police power of the state itself is limited in regard to these, so that even the Legislature has not the authority to suppress or prohibit them.

It was held, in *Metropolis Theatre Co. v. City of Chicago*, 246 Ill. 20, that by the language employed in the statute above mentioned, the Legislature intended to confer full power on cities and villages to license, tax, regulate, suppress and prohibit theatricals, etc., "subject to no other limitations than those imposed by the Constitution upon the Legislature itself." Again, in *Nahser v. City of Chicago*, 271 Ill. 288, the Supreme Court said that the clause relating to theatricals, etc., in said statute, "gave cities all the power the state had to do the things purported to be authorized by said clause, subject to no limitations except those imposed by the Constitution upon the Legislature." But in the same case it held that "the Legislature had not the power to pass an act prohibiting all amusements, but only such as came within the legitimate exercise of the police power." Since the Legislature itself was limited in its power as to amusements,

it follows that it could not delegate to cities a power which was not limited. This proposition has been expounded by the Supreme Court in a number of cases, notably in the recent decision in *City of Chicago v. Drake Hotel Co.*, 274 Ill. 408, where it was held that the power delegated to cities under this clause was not sufficient to authorize the suppression of dancing in public places of refreshment.

Consequently, if the ordinance now before us was not limited to places wherein liquor is sold the power of the City Council to suppress or prohibit these forms of entertainment and amusement would be governed by the conditions that prevailed—the time, the place, the manner of conducting them, etc. Being coupled with the sale of liquors, however, they come under a different rule and the provision prohibiting them assumes a different aspect.

The Supreme Court, even before the present charter became operative in this city, laid down the rule that, inasmuch as power to suppress the sale of intoxicating liquors was given to the common council, they could wholly suppress the sale “or grant the privileges on such terms and conditions as they might choose.” (*Schwuchow v. City of Chicago*, 68 Ill. 444.)

The courts of this state have never departed from the rule laid down in the Schwuchow case. In fact, in applying this principle, where the power to suppress and prohibit is given, our Supreme Court has gone to the last extreme. Its attitude in such cases is expressed in *Launder v. City of Chicago*, 111 Ill. 291, which was not a liquor case but which involved the same principle, where the court said:

“In such case, if the city grants a license, it may impose such conditions and burdens as it may see fit. This latitude of power grows out of the fact that it is discretionary to prohibit the business, or license it on such terms as the city may choose.”

In *People v. Cregier*, 138 Ill. 401, the following language is used:

“The General Incorporation Law, from which we have seen cities, towns and villages derive their power to deal with the same subject, confers the power to

license, regulate and prohibit the sale of such liquors without qualification or restriction, thus leaving the whole subject to the absolute and unrestricted discretion of such municipal authorities."

In *Wall v. Allen*, 244 Ill. 456, it was held that the police power was sufficient to enable the Legislature to enact laws, "either prohibiting the traffic in intoxicating liquors, or licensing it, or permitting it under any conditions which their judgment may approve." Under the authorities we have cited the same power exists in the City Council.

Thus, it will be seen that the Supreme Court has construed the statute as vesting practically absolute power in the City Council with regard to the sale or giving away of liquor. If the words of the court were to be taken literally it would be hard to conceive of an ordinance that deals with the traffic in liquor which would not be sustained.

Nevertheless, it must not be assumed that any and every ordinance would necessarily be held valid. There are certain general rules which apply to ordinances governing the traffic in liquor as well as all other ordinances. Among these are the rule that an ordinance must be reasonably adapted to the end which is to be attained, the rule that an ordinance must not be so framed as to tend to the creation of a monopoly, and the rule that an ordinance must not be discriminatory. There are other rules which must be observed, but we have singled out these because the points urged against the ordinance before us are based on them.

We will not go into details with regard to these matters, but point to such familiar cases as *Zanone v. Mound City*, 103 Ill. 552, and *City of Chicago v. Netcher*, 183 Ill. 104, as our authority for the view just expressed.

The question arises, therefore, whether, in spite of the great latitude which the City Council has, these rules would be transgressed by the enactment of the proposed ordinance.

It is first suggested that there is discrimination because the ordinance prohibits entertainments and amusements in some places where liquors are sold and not in others—that is to say, that it prohibits them in licensed dramshops, but permits them under a special bar permit. This contention

cannot be raised without throwing open the whole question of the validity of the special bar permits which the ordinances of the city authorize. Obviously, the answer to it is that if it is lawful to make a classification of dramshop licenses and special bar permits in our ordinances by which liquor may be sold in quantities of less than a gallon in some places and under certain conditions without the restrictions imposed by ordinance in case a dramshop license is obtained, then it must follow that this classification will hold good with respect to other dramshop requirements such as are now proposed. We see no useful purpose in opening up this question, since there appears to be no disposition to attack the validity of the special bar permit.

It is next argued that the ordinance will discriminate as between the saloon where liquor only is sold and the restaurant, hotel-cafe and similar places where the serving of liquor is incidental to the main business. It is claimed that many owners of places of the latter kind when applying for a dramshop license describe the place where the liquor is to be sold as the room where it is drawn from the barrel or bottle and thereby avoid the designation of dramshop for their restaurants, cafes, etc. This, it is said, is especially true of hotels, the proprietors of which have in many instances interpreted the ordinance permitting them to serve liquor from a licensed bar conducted therein to their guests on any floor or part of the hotel as authorizing such sale to the public in any room in the hotel. While the word "guest" is susceptible of a very broad interpretation, it is somewhat doubtful whether the courts of our state will construe the ordinance now in effect permitting the service of guests in a hotel in other rooms than those designated as dramshops as authorizing the serving of liquors to the public without a dramshop license covering such rooms in places open to the public as restaurants, cafes, ballrooms and the like.

We do not regard this argument of the opponents of this ordinance as sound. The definition of "dramshop" both in the statute and in the Code of the City of Chicago is broad enough to cover such places, and the exception made for the

benefit of guests in hotels does not exclude the hotel-cafes, ballrooms, banquet halls or other places where the public as distinguished from the guests of the hotel are served. The so-called "service bar," if not open to the public, is no more the "dramshop" than is the kitchen of a place where meals are served the "restaurant," or the cellar of a taproom the "tavern." The place where the liquor is sold and served and drunk by the public is the dramshop and not the inner room where the waiter or some other person draws it from the receptacles in which it is held. Nor is it logical to say that the waiter who obtains it and brings it to the table is acting as the agent for the purchaser, thereby creating the fiction of a sale in one place and consumption in another. The agency of the waiter is not of an interchangeable nature. He cannot act for both buyer and seller, and has no right to look to the purchaser in such cases for other compensation than a possible gratuity.

The next point urged is that there is a classification made with respect to the amusements themselves that is not founded on reason. There is considerable force in this contention, because the exclusion of vocal music where instrumental music is permitted does not at first blush appear to be based on a reasonable distinction.

The manufacturers of musical instruments have for centuries striven to make them capable of reproducing the manifold variations and the modulation of human tones—an object which cannot be attained but only approached. If the ordinance were so drawn that it differentiated (if that were possible) between good music which elevates and inspires and bad music which panders to the passions and depraves the appetite, there could be no question about the right of the City Council to say that good music may be permitted and bad music prohibited.

In the present instance it may be said that the ordinance would prevent vocal selections which might appeal to the patriotic or religious impulses of patrons while it would permit noisy ragtime, the jangle of the jazz band and the tom tom with which is associated the sinuous oriental dance. This

point, if it was entirely disassociated from the experience of the past, would be good. For it has been repeatedly held that a provision enacted in pursuance of the police power "must have some relation and be adapted to the ends sought to be accomplished." The quotation is taken from the case of *People v. Weiner*, 271 Ill. 74, where the court upheld this principle, and said further:

"The court must be able to see, in order to hold that a statute or ordinance comes within the police power, that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that some such end is the one actually intended and that there is some connection between the provisions of the law and such purpose."

But, even gauged by this general rule, it seems to us that the proponents of the ordinances have the best of the argument, for the courts will take into account the experience of the past. There is no time within the memory of any of us when instrumental music was prohibited by statute or ordinance at places where the sale of liquor was permitted—at concert halls, in cafes, etc. Yet there never was any demand for suppressing such music until the entertainments in such places were broadened out beyond what people had been accustomed to.

The courts have the right to take this fact into consideration and they may hold that the evils sought to be remedied are of such a nature that the ordinance tends in some degree at least to remove them. We are inclined to the belief that they will apply the principle often expressed in cases involving a similar discrimination, to the effect that an ordinance does not necessarily have to operate on all alike but need only operate equally on all embraced within its provisions. Thus, it was said in the recent case of *Biffer v. City of Chicago*, 278 Ill. 562, which involved the sale of weapons:

"Having in mind the object to be attained and the evil sought to be remedied, we do not think this ordinance should be held invalid because it is unreasonable or operates unequally upon all persons of the same class."

“ ‘If all laws were held unconstitutional because they did not embrace all persons few would stand the test; that a law is general not because it embraces all the governed, but that it may from its terms, when many are embraced in its provisions, embrace all others when they occupy like positions to those who are embraced.’ (*City of Clinton v. Wilson*, 257 Ill. 580; *Hawthorn v. People*, 109 *id.* 302.)”

We have tried to make a careful study of all the arguments urged against the validity of the proposed ordinance, and feel that while many are based on sound reasoning they will not hold in view of the broad and comprehensive power that admittedly is vested in the City Council to impose such condition on the sale of liquor as it sees fit, provided only there is some reasonable connection between the condition imposed and the end to be accomplished. There is no doubt whatever that an ordinance which will prohibit the sale of liquor in places where the proscribed entertainments and amusements are presented or indulged in would be valid. The only reason why the validity of the ordinance as drafted is questioned is because the prohibition is reversed—it is the entertainment or amusement that is prohibited instead of the sale of liquor.

We do not think, however, that it is a sound argument to say that the ordinance does not regulate the selling of liquor but regulates amusements which may be innocent. The power to regulate such amusements is not the one that is invoked, because the ordinance has no application whatever to the presentation of entertainments or amusements in any other place than in licensed dramshops. As to such places, it must be conceded that many things can be prohibited therein which could not be interfered with at other places. The courts have gone so far as to say that an ordinance prohibiting women from entering a dramshop is a valid exercise of the police power. (*Cronin v. Adams*, 192 U. S. 108.) It is obvious that the present proposed ordinance does not go to such an extreme, and it is reasonably certain that its provisions will be regarded as within the police powers of the city.

The provision of the proposed ordinance which repeals all ordinances or parts of ordinances contained in certain sections of the Code inconsistent with the provisions of same, is not subject to the objection that it leaves any inconsistency. It is true that if there are other ordinances in existence that are inconsistent they would also be wiped out, but we do not apprehend that anything will be found in the sections relating to special bar permits which will be affected by it, and these are the only ones that could be affected.

We have also been asked to state how the ordinance, if enacted into law, would operate with respect to such places as are not ordinarily classed as saloons, and whether its provisions may be evaded by such a subterfuge as the use of adjoining rooms for purposes of entertainments and dances.

We have already shown that the provisions of this ordinance must necessarily apply to public restaurants where liquors are served. We are inclined to the opinion that it will also apply to all rooms of hotels open to the public in which liquors are served to the patrons. As indicated above, there is some room for doubt on this which is dependent on what our courts will construe the word "guest" to include. There are several New York decisions in which it is held that a person who in good faith goes to a hotel during the regular hours when meals are served and orders and obtains a meal is a "guest" of the hotel.

It may be that, following out the idea expressed in these cases, some of our hotels will insist that the rooms devoted principally to eating in their hotels are not dramshops. But it is doubtful whether they can sustain their position. The provision in the ordinance authorizing the sale of liquor in other rooms besides the licensed dramshop of the hotel does not, in our opinion, take away from the rooms open to the public where liquor is served the character of a dramshop. These rooms would still have to be regarded as dramshops, and in case there was a test made it is more than probable that the court would hold the present provision of the Code invalid if it was construed as an attempt to exclude such

public rooms from the provisions of the ordinances regulating dramshops.

We apprehend that it would be possible, under the proposed ordinance, to consume liquors at a dance or other prohibited entertainment in a clubhouse where the members keep such liquors, belonging to them personally, in private lockers. If the liquor were to be dispensed by the club, however, it would have to be sold and served only in that part of the clubhouse which has been designated as a dramshop in the license, and no such prohibited entertainment could be given in that part of the clubhouse.

Where the keeper of a dramshop presented the entertainment in one room and served liquors in another room, it might be possible to evade the provisions of this ordinance. But it would be necessary to have the two rooms entirely disconnected or at least separated by a wall and closed door, since the ordinance prohibits the entertainment or amusement "in connection with the offering, serving, sale," etc., of liquors. In such event, if an admission fee to the dance or entertainment was charged, the room in which it is held would have to be a licensed hall and the abuse of the privileges granted by the license could be prevented. If no admission fee was charged and a dance hall or place of entertainment was maintained for the purposes of dancing or entertainment of patrons of the dramshop, under the terms of this ordinance it might be difficult to prevent patrons from going back and forth from the dramshop to the room in which the entertainment is carried on.

The ordinance would prevent dancing and all other entertainments except instrumental music at such places as the Edelweiss Garden, Bismarck Garden, and other so-called summer gardens, unless the place where the dancing is conducted is entirely distinct from the enclosure in which the dramshop is located. If there were a separate room for dancing, patrons might, as indicated above, go back and forth as in the case of a saloon in a room adjacent to the room where an entertainment is conducted.

At picnic grounds the ordinance would prevent the selling of liquor in different places on the grounds unless separate licenses for such places were secured. A license covering the entire picnic park would not permit the carrying on of the prohibited entertainments or amusements within the enclosure.

Patrons of dances in regularly licensed dance halls, under this ordinance, could probably not be prohibited from going in and out for the purpose of partaking of liquor in a room entirely disconnected with the dance hall. In case a special bar permit is obtained, that will permit the sale of liquor in the dance hall itself the same as at present.

Amusement parks, under the proposed ordinance would not be able to conduct dances or other entertainments in places where liquor is sold, and there could be no general license covering the whole enclosure.

There is no exception made in the ordinance concerning private weddings, receptions, balls, banquets and other affairs of this kind, even though not open to the general public. The ordinance prohibits the holding of private balls in rooms that must be regarded as dramshops, and if banquets, weddings and the like are held in such places they must conform with respect to singing, dancing, etc., just as if the place was open to the public at the time of such private affair. That rule prevails in the case of hotels and clubs as well as in other dramshops if such an affair is given in a room which is licensed as a dramshop.

We believe we have outlined above the principal features of the ordinance with respect to the places which it affects.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Physicians and Nurses at Public Schools.

November 20, 1917.

HON. EUGENE R. PIKE, City Comptroller..

Dear Sir:

We are in receipt of your letter of recent date in which you call attention to the fact that physicians and nurses are assigned by the Department of Health to safeguard the health of children attending the public schools. You state that the salaries of these employes are paid out of the general corporate fund, that you are in doubt as to whether this is correct, and you ask whether it would be legal to charge this expense to the educational fund.

We assume that your inquiry is directed to the propriety of shifting this expense to the Board of Education for the future, since there is no possibility of charging anything to the educational fund until action is taken by that board. There is no doubt that the City Council has the right to appropriate funds for this purpose. Therefore, the only question is whether the Board of Education has such power, and whether, in case it has such power, it is obliged to assume the burden of caring for the health of the children in this way.

The rule that all municipal corporations and *quasi*-public corporations are limited strictly to the powers expressly delegated to them is universal. Another rule that is quite as well recognized is to the effect that where there is any doubt as to the existence of a power such doubt must be resolved against the corporation.

The Board of Education has very broad general powers. Many of these are expressly enumerated by statute. Above and beyond those there exists the general power delegated in Section 139 of the New School Act (1917 Session Laws, p. 731), which reads as follows:

“Sec. 139. The specifications of the powers herein granted are not to be construed as exclusive, but the Board of Education shall exercise all the powers that may be requisite or proper for the maintenance and the fullest development of an efficient public school system, not

inconsistent with these (those) general provisions of the school law of the state which apply to all school districts.”

Thus, it appears that the Board of Education would be justified in making provision for anything which can legitimately be regarded as necessary or desirable to raise the standard of efficiency in the public schools. We have no doubt that our courts would construe any reasonable measure adopted by it to safeguard the health of pupils as within its powers. To that end it may even employ physicians and nurses whose duty it would be to assist in cases of emergency. In fact, it is hard to draw the line at the place where its health powers come to an end. It may provide instructors for physical exercises, purchase and maintain equipment for gymnasiums, employ medical examiners, and do many things which will have a tendency to promote the health of the pupils. But we question whether it would have the right to go so far as to employ regularly a large medical force to discharge the duties of the staff of the Department of Health now engaged in the Division of Child Hygiene, since that looks after the general health requirements of a large portion of the population, a function which is pre-eminently the duty of the city authorities.

In other words, there is some limitation on the powers of the Board of Education with respect to the well-being of the children in the schools. It cannot go beyond the maintenance of the efficiency of the schools to adopt measures for the preservation of the health of the community any more than it can go beyond them to provide for the proper nourishment, clothing or transportation of the pupils.

While the question before us has never been directly passed on in this state, some light may be obtained from the decisions on other points of a similar nature.

In *Sherlock v. Village of Winnetka*, 68 Ill. 530, the Supreme Court strongly condemned the proposed establishment of a boarding house and dormitory in connection with a public high school.

In *Mills v. School Directors*, 154 Ill. App. 119, the ques

tion was the right to use school funds for hauling children living remote from the school to and from same. The court said:

“The policy of the law is to encourage the maintenance and efficiency of school systems; however, the officers of the school district have not unlimited power. The Legislature deemed it necessary to pass an act by which text books may be supplied to children whose parents are unable to buy them. If the contention of appellants be correct then that statute was unnecessary. The directors have only powers which are expressly granted them and such implied powers as are necessary to carry into effect the express powers delegated to them. To secure the right and opportunity of equal education does not require that the children should be hauled to school any more than it would require that the directors should clothe them or furnish meals. We are constrained to hold that the acts of the directors in hiring wagons and making contracts for the hauling of children to school were beyond their powers, illegal and void.”

We call attention, in this connection, to the statutes in many states providing that transportation should be afforded to pupils living at a distance, as showing the necessity of delegating express power in order that funds may be expended for that purpose.

See Notes:

37 L. R. A. (N. S.) 1110.

38 L. R. A. (N. S.) 710.

Having in mind the extensive powers of the Board of Education on the one hand and the fact that there must be a limit to the appropriation of money for public health activities of the school authorities on the other, we are unable to say that the whole of the expense of maintaining this staff of physicians and nurses would be properly chargeable to the educational fund even if the Board of Education should signify a willingness to assume the burden. That a part of it may be assumed by the board seems quite probable.

We therefore suggest that the matter be taken up with the proper committee of the Board of Education so that if possible a division of the expense may be agreed upon. The

commissioner of health will undoubtedly find means of making arrangements by which he can retain general control of the situation and at the same time turn over to the school authorities such part of the work of maintaining the health of the children as comes properly within the scope of their work. It might also be well, before proceeding in accordance with this plan, to get the Department of Health to present a statement or report of some kind showing in detail just what is done by the physicians and nurses who are assigned to the schools, so that we can examine same and perhaps determine beforehand what portion of the work can be legally assumed by the Board of Education.

We are of the opinion that there is enough ground for believing that some such division can be made to warrant further consideration of the subject.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consent for Oil Filling Stations.

November 9, 1917.

HON. J. C. McDONNELL, Chief, Bureau of Fire Prevention
and Public Safety.

Dear Sir:

We are in receipt of your communication of October 23rd, propounding the following query regarding Section 5 paragraph (b) of the Oil Ordinance:

“Does the ordinance require a majority frontage of all property in and surrounding the block?

or

“Does the ordinance require a majority frontage on both sides of each street adjacent and adjoining said block or square?”

Paragraph (b) of Section 5 of said ordinance provides as follows:

“(b) Whenever application is made to install any tank or tanks for the storage or sale of any of the liquids mentioned in Section 2 of this ordinance in any block or square in which two-thirds of the improved property, according to frontage on both sides of the streets surrounding such block or square, is used exclusively for residence purposes, such application shall be accompanied by the written consent of a majority of all the property owners according to frontage on both sides of the streets surrounding such block or square before a permit may be issued. This provision shall not be applicable to the installation of a tank containing any of the oils referred to in Section 2 of this ordinance, when such oils are to be used in connection with garages or existing manufacturing plants where such oils are incidental to the business conducted.”

The portion of said paragraph (b) of Section 5 referring to frontage consents provides:

“Such application shall be accompanied by the written consent of a majority of *all* the property owners according to frontage on *both sides of the streets surrounding* such block or square before a permit may be issued.”

This office under date of April 11, 1913, (Opinions of the Corporation Counsel and Assistants January 1, 1913, to October 5, 1914, page 217) rendered an opinion to your bureau covering precisely the same question now raised.

In the former opinion rendered the ordinance provided as follows:

“Such application shall be accompanied by the written consent of a majority of the property owners according to frontage in such block or square, before a permit shall issue.”

The italicized words in the present ordinance have been added since our former opinion.

In its present form paragraph (b) Section 5 of the Oil Ordinance requires a majority of *all* the property owners according to frontage *on both sides of the streets surrounding the block*.

In this ordinance the words "block" or "square" are used synonymously and refer to an area bounded on all sides by streets.

In view of the foregoing we are of the opinion that paragraph (b) of Section 5 of the Oil Ordinance heretofore quoted requires a majority frontage of all the property on both sides of the streets in and surrounding the block.

The ordinance does not require a majority frontage on each street, but requires a majority frontage of all property on both sides of the streets in and surrounding the block or square.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

City's Control Over Railroad Tracks.

November 13, 1917.

HON. GEORGE PRETZEL, Chairman of Sub-committee on Local Industries.

Dear Sir:

We are in receipt of your letter of October 25, 1917, requesting an opinion as to whether the Council can insert, in an ordinance granting the Chicago, Milwaukee and St. Paul Railroad Company the right to cross Clybourn avenue near Wrightwood avenue with a switch track, the provisions that said railroad company should make an agreement with the Chicago Surface Lines, whose tracks are crossed by this switch track, to protect the latter from damages which may happen at this crossing and also to pay the necessary expenses for the upkeep of this crossing.

We are of the opinion, that the City Council can insert these provisions in the ordinance. We suggest that the better way would be to insert the conditions themselves in the ordinance, and we have drafted a section to be inserted in said

ordinance covering the provisions you ask about. We suggest that you make this Section 3 of the ordinance, renumbering the other sections.

The city as a partner of the street railway companies and as a prospective owner of the street railway lines is interested in seeing such provisions included in a switch track ordinance where the switch track crosses a street railway track.

The ordinance under which the Chicago, Milwaukee and St. Paul Railroad Company originally built its switch track at this point was passed August 2, 1886, by the Board of Trustees of the Town of Lake View. Under its terms the grant does not run for a definite period, but is subject to repeal at any time.

The Supreme Court of Illinois, in the case of *The People v. Chicago Telephone Company*, 220 Ill. page 238, has passed on grants similar to this one. Concerning these grants it has this to say:

“Such grants cannot be construed to be perpetual and at most cannot extend beyond the lives of the corporations granting them.”

In view of the decision of the Supreme Court, we are of the opinion that the city irrespective of said ordinance may provide that the railroad company shall remove its tracks from the streets.

Yours very truly,
GOTTHARD A. DAHLBERG,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Claim of Western Express Company.

November 16, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

Acknowledging your communication under date of June 15, 1916, *In re* the claim of the Western Express Company

for refund of license fees for public carts, we submit the following:

Whether or not the company is entitled to a refund depends upon whether the company is employing public carts as defined by the city ordinance. A public cart is thus defined:

“Every express wagon, furniture van, cart, truck, wagon, or other vehicle drawn by one or more horses or other animals, which shall be kept, used, operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, or other articles within the city for hire or reward, shall be deemed a public cart within the meaning of this article, and every such vehicle so described and defined herein as a public cart shall be deemed such whether employed or hired from any public stand or from any street or public way, or from any private barn, office or other place in the city. The place where any such public cart is hired or employed shall not determine whether such vehicle is a public cart, but the business in which such cart is engaged while on the streets and public ways of the city shall determine the character of such vehicle. It shall be immaterial in determining the character of any vehicle whether the driver or person in charge and control of any such vehicle solicits custom or accepts employment therefor from any private office or private place, or from or along any street or public way in the city; provided, however, that nothing herein contained shall be held to require a license for any vehicle or vehicles rented to any person or corporation for the purpose of transacting the business of such person or corporation, solely, but if any such vehicle be employed in and about the business of more than one person or corporation for the purpose of transporting or conveying any of the articles hereinbefore in this section described, in such case any such vehicle shall be considered a public cart.”

The contention of the company that its wagons are only employed in the conduct of its own business and therefore are within one of the provisos of the definition which relieves it from the requirement of securing licenses is hardly well-founded.

The business of an express company is to do the very thing described by the ordinance as being the essence of a public cart; the transporting of goods for hire and reward.

In incorporating in Illinois December 12, 1910, the Western Express Company declared its purpose to be:

“The transportation, shipping and forwarding of money, goods, merchandise, property, etc., and the transportation of such other business as is usual and customary to be transacted and done by express companies.”

An investigation discloses that this company calls and picks up and delivers packages as other express companies doing business throughout the city, although a great deal of its business is hauling and delivering packages and trunks for the Soo Line Railway.

While the greater portion of the business of the Western Express Company appears to be for the Soo Line Railway it is not contended that this company transports only the goods of this corporation or that its wagons are rented exclusively to the service of the Soo Line, to transact solely the business of said corporation. An express company engaged in transporting goods for hire and reward though largely for one company is not within the provisos of the ordinance which relieves it from securing licenses under the definition of a public cart.

We are therefore of the opinion that this company is an express company engaged in the transportation of goods for hire and reward by the use of vehicles drawn by horses or other animals and comes under the regulations of a public cart and is required to obtain licenses accordingly.

Very truly yours,

GEORGE W. ELLIS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Interpretation of Building Code.

November 20, 1917.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

We are in receipt of your communication in which you request to be advised as to the proper construction to be placed upon Paragraph (b) of Section 230, Chapter 16 of The Chicago Code of 1911.

Paragraph b of Section 230 as amended February 21, 1916, page 3345 of the Council Proceedings, provides as follows:

“(b) All plans and drawings for the construction or alteration of any building or other structure for which building permits are required shall, before such permits are issued, be presented to the commissioner of health for examination and approval as to proposed plan for the ventilation of rooms, light and air shafts, windows, the ventilation of water closets, drainage and plumbing. They shall also be presented to the chief of fire prevention and public safety for approval. They shall also be presented to the boiler inspector and smoke inspector in all cases where permits from these departments are required to be procured by the ordinances of the city.”

You state that under paragraph (b) the Health Department claims that they are authorized to construe certain sections of the building ordinances as being related to matters of light and ventilation and places their enforcement on the Health Department and the building commissioners, whereas, you maintain that paragraph (b) is an advice to the public that it is necessary to have building plans approved by the Health Department in such matters as are contained in the health ordinances, and gives no power to the health commissioner to construe or enforce the building ordinances.

The provisions of paragraph (b) of Section 230 of the Chicago Code specifically set forth the matters that are to be submitted to the commissioner of health for examination and approval. From this provision it is evident that the

Council intended that both the building commissioner and the commissioner of health should be charged with the duty of seeing that the proposed plans comply with the requirements of the ordinances relating to the ventilation of rooms, light and air shafts, windows, the ventilation of water closets, drainage and plumbing; and, hence, it is our opinion that paragraph (b) of Section 230 as amended February 21, 1916, requires that the commissioner of buildings and also the commissioner of health approve all plans and drawings so far as the ventilation of rooms, light and air shafts, windows, the ventilation of water closets, drainage and plumbing, are concerned; and that the commissioner of health has no duty to perform under this ordinance other than such approval of the plans.

Very truly yours,
 GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Encroachment of Chicago & Western Indiana Railroad Co.
 on Streets.**

November 7, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.
 Dear Sir:

We are in receipt of your communication of October 26th in reference to the question of encroachments on public streets and alleys by the Chicago & Western Indiana Railroad Company during the process of track elevation, in which you request this department to draft an order to be introduced in the City Council directing the commissioner of public works to stop further track elevation work by the Western Indiana until the plans required under the ordinance have been filed with the commissioner of public works.

Section 13 of the ordinance of April 5, 1911, provides that at least ten days prior to the commencement of any part of such work, the plans and specifications therefor shall be

submitted to the commissioner of public works for his examination and approval and all work outlined and included in said plans shall be constructed in strict conformity therewith. This section is very explicit and is one of the first requirements of the railroad company to perform before they enter upon the progress of said work; and before an order should be passed stopping the work, if the same is already in progress, this department should be informed as to whether or not there really is an encroachment upon the streets which are not to be vacated under said ordinance for said elevation work in accordance with said plans.

Paragraph 10 of said ordinance provides that the railroad and railway companies mentioned are authorized to make such changes in the position and alignment of their main tracks, side tracks, turnouts and switch connections as may be rendered necessary by the carrying out of the provisions of the ordinance and are authorized and required to construct elevated embankments on the rights of way occupied by them, and may construct, maintain and operate such number of railroad tracks as they may deem necessary or convenient for the transaction of their business, and to carry such additional tracks over all intervening streets, avenues and alleys in the same manner as herein provided for existing tracks.

Section 16 provides that all streets and avenues and alleys crossing and extending into the rights of way of the several railroads, which are authorized to elevate their tracks, except streets and alleys at which subways are to be provided by the terms of the ordinance, shall be and the same are hereby vacated in so far as they extend within said rights of way as said rights of way shall be shown upon the plans hereinabove referred to in the second clause of Section 13 of the ordinance.

The second paragraph of Section 13 provides for a general plan or exhibit, on a scale of one inch equals one hundred feet, of all right of way as said right of way exists at the time of the filing of said plan, and shall likewise show all tracks, retaining walls, abutments, fences and appurtenances

as it is proposed to establish them in carrying out the plan of track elevation as provided in the ordinance.

As to whether or not there is or will be an encroachment upon the streets and alleys will be entirely governed by the plans as submitted; and as the railway company has the right to change the position and alignment of said main tracks, etc., and to carry such additional tracks over all intervening streets, avenues and alleys in the same manner as provided for the existing tracks, as provided in paragraph 10, before we can give an opinion as to whether or not there is an encroachment, we should have before us the plans showing the changes in the position and alignment of main tracks and additional tracks as contemplated in the elevation of said railway's right of way.

You also state that this department is requested to render an opinion as to the city's rights in a number of streets involved and in controversy prior to the passage of the so-called Plymouth place ordinance. We apprehend that you mean the streets involved under the track elevation ordinance as passed April 5, 1911.

In reply, we desire to say that we wish you would be more specific as to the names of the streets involved and just as to what you mean by the rights in the streets involved.

As to an opinion whether the city is right in its contention that only streets and alleys that entered into or crossed the right of way of the railroad company at the time of the passage of the ordinance should be the streets and alleys vacated and not also the streets and alleys which are included in property purchased for a right of way subsequent to the passage of the ordinance. To this question we must again reply that under paragraph 10 of the ordinance of April 5, 1911, the railway company has a right to carry all such additional tracks over all intervening streets, avenues and alleys in the same manner as provided for existing tracks, and before giving an opinion, we should be informed as to whether or not the railroad company incorporated more land or more right of way in their plans which would be necessary to carry out the provisions of the ordinance than those that were in existence at the time of the passage of the ordinance.

We are of the opinion that it would be inadvisable to stop all the work under the assumption that the Western Indiana is encroaching upon more of the streets or alleys than was contemplated at the time of the passage of the ordinance, and, therefore, submit an order which will allow the railroad to proceed with work of elevation of existing tracks until plans are submitted therefor, and which will stop all further encroachment upon streets and alleys, necessary for the laying of additional tracks thereon until plans are filed as provided by ordinance.

Very truly yours,
BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Organization of Public Health District.

November 19, 1917.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.
Dear Sir:

Your letter concerning the formation of a public health district under the statute recently enacted was referred to the undersigned for consideration and reply.

The statute in question (1917 Session Laws, page 763), authorizes any town, or two or more adjoining towns, in counties under township organization, to form a public health district of same upon petition of five per cent of the voters and a majority vote thereon at a subsequent election. Such district may also be formed by road districts in counties not under township organization, or by a town or towns in a county under township organization with an adjacent road district or road districts in a county not under township organization.

The purpose of the act seems to be to enable people living in territory which has not the benefit of a local health administration to form an organization adapted to their needs so

that local health conditions may be conserved in the same manner as is done in organized cities and villages. This is evidenced by the fact that the election machinery provided by the act is the same as that provided for township and road district elections, and the organization of such boards of health is made up of township and county officers, or road district and county officers, as the case may be. There is, however, nothing, so far as we can see, in the act which would prevent such towns or road districts lying within or partly within cities and villages from organizing public health districts if it is deemed advisable to do so. In other words, if any advantage could be obtained by organizing such a public health district in towns wholly or in part within the City of Chicago, it can be done under this statute. The County of Cook is under township organization, and, although most of the towns that have territory within the City of Chicago are now merged into one town, the law applies to the towns wholly or in part within the City of Chicago just as well as to other towns in the county.

We assume that there is no reason at present to go into the history of the changes in the township organization of Chicago and the shifting of the duties of officers thereunder. We, therefore, will not go into details further than to say that what you speak of as "a very indefinite state" on account of special laws abolishing township officers is not an insuperable obstacle. By the revenue law of 1898 the town assessors of such townships as were in the City of Chicago at that time were done away with. Later on, by the Act of April 24, 1899 (Hurd's Rev. St. 1915-16, page 2644), provision was made for consolidating the towns included in the territory of the city into one township. Still later an act was passed which placed certain duties into the hands of city clerks and county treasurers, and finally it was provided that the city clerk and town clerk should be united in the same person, that the city treasurer and town collector should be united in the same person, and that the county agent should perform the duties of the poor master of the township. An inquiry into these various statutes might be interesting, but is not necessary for the purposes of this opinion. (See Ses-

sion Laws of 1901, page 314, Session Laws of 1903, page 352, Session Laws of 1905, page 397, Hurd's Rev. St. 1915-16, page 2658.) It will require a close study into a number of legislative enactments apparently conflicting and certainly confusing to determine definitely how to proceed if the new act is to be invoked.

It will suffice in this connection to say that while the township boundaries of the main part of the city are now recognized only for purposes of taxation and the maintenance of park districts, nevertheless, if there should be any occasion for bringing into life a full township organization vested with powers to do the acts that are required of township officers, it can be done. Consequently, it is a question of policy whether or not the new public health district act of which you speak should be resorted to for the purpose of creating a public health district thereunder which will be practically co-extensive with the City of Chicago.

You will see from an examination of Sections 15, 17 and 18 of said act that such a public health district and the officers provided therefor by statute would in effect replace the health department of the City of Chicago. The taxing powers accorded to such a district are not to exceed four mills on the dollar on all taxable property embraced therein. This would mean that, in those towns of which the whole or part of the territory is included within the limits of the City of Chicago, the revenue for the district, based on the last assessment, would amount to more than \$4,000,000 annually.

The law contemplates that such a public health district may be formed by the people on their own initiative and that it will be maintained independent of the city authorities. If it should be found desirable, as you suggest, to amend the act so as to place jurisdiction in the city government and to have the Civil Service law apply to it, we believe that a much simpler way of accomplishing the end in view is to amend the Cities and Villages Act.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Kilbourn Avenue.

November 26, 1917.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Replying to your communication concerning South Kilbourn avenue (formerly South 45th avenue) between West 26th and West 28th streets, in which you ask advice as to whether or not the property in question is a public street, we beg to inform you that from a personal investigation of the records in the recorder's office and from the book of plats (Cicero, page 33) in the assessor's office, we find that South Kilbourn avenue (South 45th avenue) has been dedicated by plat (known as S. E. Storer's subdivision of the south seven (7) acres of the northeast quarter of the southwest quarter of section 37-39-13), and extends north from 28th street 197.08 feet. The balance of South Kilbourn avenue from said subdivision north to 26th street (as per blue-print accompanying your communication) is shown on the assessor's books as acre property, and said street is not shown as ever having been open. The property has been assessed by the assessors, and the taxes have been paid thereon as lands known as:

“That part of (except railroad) the north 33 acres of the northeast quarter of the southwest quarter of Section 27-39-13,”

which includes South Kilbourn avenue (South 45th avenue), up to and including 1916, and was owned by the heirs of John Nash, deceased, all residing in the City of Cleveland, County of Cuyahoga, Ohio, who have paid the taxes up to 1916.

In the year 1916 said north 33 acres were sold by the heirs of Nash, and the said property is now owned by three parties and is assessed as land, including South Kilbourn avenue (South 45th avenue).

On December 31, 1892, a petition was filed in the case of *City of Chicago v. Thomas Nash et al.*, case No. 144,865, Superior Court, for the opening of 45th avenue from 12th street to the south branch of the Chicago river, which included a

strip of land 66 feet wide extending from 26th street to Storer's subdivision (as per blue-print attached).

On May 24, 1894, a verdict was rendered for damages, and on March 6, 1896, judgment was rendered on a verdict. In said order for judgment it was provided that payment should be made by the City of Chicago either to the county treasurer or to the several owners of property of the sums of money as provided by jury on verdict in said cause. The amount of damages allowed to the owners of the north 33 acres of the northeast quarter of the southwest quarter, section 27-39-13, was \$5,000.

Upon examination of the files in the Superior Court we find that the verdict and judgment were subsequently set aside as to several of the property owners but not as to the property in question.

Upon investigation of the records of said case in the Board of Local Improvements, we find that there is no entry on the books showing that money was paid to the owner of the premises in question, nor that said amount has been paid to the county treasurer, nor is there any evidence in the city comptroller's office that the city comptroller has ever paid said amount of \$5,000 to the county treasurer or to any of the property owners whose land was condemned and judgment rendered for the opening of South 45th avenue.

On March 25, 1895, while the court proceedings were still pending for the opening of South 45th avenue, the City Council passed an ordinance for the construction of a sewer in 45th avenue from 12th street to the south branch of the Chicago river by special assessment, and an assessment roll was filed in court and the same was confirmed on December 4, 1896. The sewer was constructed in accordance therewith, although the city had not obtained possession of South 45th avenue as condemned, but it appears that prior thereto and while a sewer was being constructed the City of Chicago obtained quit-claim deeds for a street or easements from the property owners mentioned in the condemnation proceedings to construct a sewer on a strip of ground 66 feet wide in line with South 45th avenue as follows:

Deed dated April 26, 1897—From 12th to 22nd street, except that part dedicated by plat between 14th street and 16th street.

Deed dated May 1, 1897—From 22nd street to Ogden avenue.

Deed dated November 10, 1896—From Ogden avenue to C. B. & Q. Railroad right of way.

Deed dated November 10, 1896—To construct a sewer from C. B. & Q. railroad to 26th street.

The city has no deed, agreement or title to 45th avenue from 26th street to Storer's subdivision, which is acre property (same being part of the street in question.)

The street is dedicated by plat from a point 197.08 feet north of 28th street to 28th street (Storer's subdivision).

From 28th street to 31st street 45th avenue is platted by subdivision.

Deed dated February 18, 1897—From 31st street to the south branch of the Chicago river.

On May 14, 1897, the City of Chicago filed for record a plat showing the parcels of land above deeded to the City of Chicago for a public street called South 45th avenue from 12th street to the south branch of the Chicago river, which plat was endorsed as follows:

"Approved May 12, 1897, H. J. Jones, Examiner of Subdivisions."

Said plat does not show 45th avenue open from 26th street to Storer's subdivision, as referred to on blue-print, but shows it as acre property, and is identical with the plat in the assessor's office referred to above.

From an examination of the records and files in *re City of Chicago v. Thomas Nash et al.*, No. 144,865, Superior Court, petition to open 45th avenue, we find that upon notice first being given to all parties by the City of Chicago by Edward J. Brundage, Corporation Counsel, and G. A. Mason, Attorney for the Board of Local Improvements, an order was entered on June 16, 1908, as follows:

"It is ordered and adjudged that all orders entered herein be and the same are hereby vacated and set aside and the petition filed herein be and the same is hereby dismissed without prejudice.

(Signed) Smith, Judge.

(Signed) G. A. Mason."

Section 15 of Chapter 24, Article X, Cothran's Revised Statutes of Illinois, 1889, page 248, provides for special assessments for local improvements as follows:

"The court, upon proof that said just compensation so found by the jury has been paid to the person entitled thereto, or has been deposited as directed by the court (and bond given, in case of any appeal or writ of error), shall enter an order that the city or village shall have the right, at any time thereafter, to take possession of or damage the property, in respect to which such compensation shall have been so paid or deposited, as aforesaid."

We are of the opinion that the City of Chicago, by the dismissal of the condemnation proceedings,—no compensation having ever been paid to the owners of the property in question in accordance with the order of court during the time that the judgment was effective and no order for possession having ever been entered, although it had acquired deeds for a 66-foot strip of land for street purposes from other property owners who were made parties to the condemnation proceedings, and also certain easements to construct a sewer in 45th avenue, abandoned the proceedings for the opening of South 45th avenue.

In the case of the *C., R. I. & P. Ry. Co. v. City of Chicago*, 143 Ill. 646, the court said:

"A municipal corporation seeking to condemn real estate for public use may, after the assessment of damages and judgment of condemnation, abandon the enterprise in aid of which the condemnation is sought, or abandon the location of the route selected and adopt some other; and unless, within a reasonable time, the damages are paid and possession taken of the property condemned, the condemnation proceedings will be regarded as abandoned." (*City of Chicago v. Barbican*, 80 Ill. 482.)

In the case of *Chicago & Northwestern Ry. Co. v. City of Chicago*, 148 Ill. 141, at page 143 the court said:

"A city filing a petition to condemn land for the extension of a street, is under no legal obligation to pay any money unless it chooses to do so, and it has the right to abandon the improvement. Until payment of the award is made by the city, its right to take possession of the property does not accrue. Compensation must precede the taking of the property."

The city, having abandoned the condemnation proceedings, had no right to take possession of the property, but if it took and retained the possession thereof, the owner would have a remedy by ejectment or trespass.

City of Chicago v. Heyward, 176 Ill. 135.

C. & St. L. R. R. Co. v. Gates, 120 Ill. 86.

Schneider v. Chgo. & Evanston R. R. Co., 115 Ill. 349.

Chicago & Iowa R. R. Co. v. Hopkins, 90 Ill. 316.

Under the statute, the city may acquire streets by plat, by condemnation proceedings or by prescription.

The portion of 45th avenue in question has never been dedicated by plat, and from a personal investigation of the premises and interview with property owners I find that the city cannot establish a right by prescription. Mr. John J. Jacobs, 2745 South Kilbourn avenue, who has a cottage on said street, in Storer's subdivision, informed the writer that he has lived there for the past 28 years and that South 45th avenue north of Storer's subdivision has never been used as a public highway; that no vehicles have ever traveled thereon, that the same has always been acreage property and that it has never been recognized as a street.

We are, therefore, of the opinion that, inasmuch as the city has abandoned the condemnation proceedings, and the owners of said premises have always been in possession of the same and paid the taxes thereon, and inasmuch as no dedication of the premises has been made by plat, or prescriptive right established by the city to the said strip of land as indicated on the blue-print, the city has no right, title or interest in and to said strip of land designated on the plat accompanying your communication as South Kilbourn avenue, from West 26th street to Storer's subdivision, and that the same is not a public street.

Yours very truly,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Recovery of Costs in Suit for Violation of an Ordinance.

November 21, 1917.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your communication of October 17, and attached correspondence and receipted bills in re claim of John J. Moser for reimbursement of costs in case of *City v. Moser*. In a number of cases decided by the Illinois Supreme and Appellate Courts the proposition of law, that "a municipal corporation is not liable for costs made in prosecuting supposed violations of its ordinances and that a judgment for costs cannot be entered against it when the defendant in any such prosecution is acquitted," has been upheld.

City of Monmouth v. Popel et al., 183 Ill. 634.

City of Centralia v. Nagele, 181 Ill. 151.

Chicago v. Reinschrieber, 121 Ill. App. 121.

Princeville v. Hitchcock, 101 Ill. App. 590.

City of Chicago v. Lowenthal, 242 Ill. 404.

In the case of *Anderson v. Schubert*, 158 Ill. 75, which was cited by Mr. Moser, the court, at page 77 said:

"This is a *quasi* criminal prosecution, for the violation of a city ordinance. No statute in express terms makes the city liable for costs therein in the event the suit results in the acquittal of the defendant. In Section 40, Chapter 53, entitled 'fees and salaries,' (Starr & Curtis' Stat., p. 1139), it is provided 'that the costs in criminal and quasi criminal prosecutions for the violation of an ordinance of an incorporated city or town, where the provisions of the charters of such towns or cities do not prohibit the payment of such costs, may be paid by such city or town in the discretion of the City Council or Board of Trustees of such incorporated cities or towns.' Under this statute it is left to the discretion of the municipal authorities to pay costs or not. It has been held in *Town of Nokomis v. Markey*, 31 Ill. App. 107, and in numerous subsequent Appellate Court decisions, that a municipal corporation is not liable for costs made in prosecuting supposed violators of its ordinances, and that a judgment for costs cannot be entered against it when the defendant in any such prosecution is acquitted."

In the claim of Mr. Moser the following items are listed:
 Expense as shown by transcript already submitted. \$52.50
 Fine and costs paid under protest. 7.00
 Costs of printing brief 14.60
 Costs of printing reply brief 12.90
 Costs of service (sheriff fees) 1.75

The word costs as used in this provision means, costs that may be taxed in a suit between individuals. The only printers' fees taxed in the Appellate Court are for abstracts filed and these are taxed at a rate of 20c for each one hundred words of one copy of such abstracts against the unsuccessful party for furnishing the same, as costs are to be recovered by the successful party furnishing such abstract. In no case has an allowance been made for printing briefs or reply briefs. The costs of service (sheriff fees) is a proper charge.

We have not been furnished with the transcript referred to in Mr. Moser's letter, so are unable to determine what the nature of the charges are that made up the item \$52.50.

Under the statute herein before quoted the council is authorized to allow this claim to the extent above indicated, but if they do not allow it payment cannot be compelled.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Request for an Increase in Pensions.

November 28, 1917.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF
THE CITY OF CHICAGO:

Gentlemen:

A request has been filed by certain beneficiaries of the pension fund in which they ask that, commencing July 1, A. D. 1917, their pensions be increased to \$1,000 per annum. They base their request on the change in the law as provided in the amendment to the Police Pension Fund Act which became effective on July 1 last.

It is conceded that both of these persons served over twenty years in the Police Department of the City of Chicago prior to their retirement, and the records of the Police Department show that they both held the rank of captain of police at the time of their retirement.

The Police Pension Fund Act, at the time of their retirement, provided that members of the Police Department should be retired at one-half of the annual salary payable to the rank held by them in the twentieth year of their service.

Both of the said persons held the rank of lieutenant of police in the twentieth year of their service in the Police Department; they remained in the service and were afterward promoted to the rank of captain of police, which rank they held for a number of years. In accordance with the provisions of the Police Pension Fund law in force and effect at that time, when they were retired from the Department of Police. They were compelled to accept retirement on a pension equal to one-half the amount of the yearly salary paid to lieutenants of police—the rank which both of them held in the twentieth year of their service in the department.

Section 3 of the Police Pension Fund Act of the City of Chicago as amended and in force and effect July 1, 1917, provides, in part, as follows:

“§3. Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or regular policeman in any such city, and shall have served for a period of twenty (20) years or more as such policeman in the police force of any such city, or where the combined years of service of such person in the police department and fire department of any such city shall aggregate twenty (20) years or more, in either such case when such person shall have arrived at the age of fifty (50) or more years he may make application to said board for retirement, and said board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension:

“(A) Equal to one-half of the amount of the salary attached to the rank which he may have held in said police force for one year immediately prior to the time of his retirement from the police force: *Provided, however,* that the maximum sum for such pension shall not exceed the sum of one thousand three hundred (\$1,300) dollars

per annum to any one person who retires as general superintendent of police, or one thousand one hundred and fifty (\$1,150) dollars per annum to any person who retires as first deputy superintendent of police, or one thousand one hundred (\$1,100) dollars per annum to any person who retires as captain of police, or one thousand (\$1,000) dollars to any person who retires as a lieutenant of police, and the maximum sum for all other persons retiring shall not exceed the sum of nine hundred (\$900) dollars per annum and the minimum be not less than six hundred (\$600) dollars per annum, *and notwithstanding any provision contained in this act or the act to which this is an amendment, the pension to be paid from and after the date of the passage of this act to any person occupying the position or office of captain of police or a position or office superior in rank thereto, who has been heretofore retired, voluntarily or otherwise, from the department and is now receiving the benefits of the act to which this is an amendment and of this act, shall be one thousand (\$1,000) dollars per annum.*"

In order to determine whether or not these two persons are entitled to an increase in their pensions, it is necessary to construe the above statute.

The language of the statute is clear and does not admit of doubtful meaning. It clearly provides that any person occupying the position of captain of police or a position in the Police Department superior in rank thereto, who has been heretofore retired from the department on a pension, shall be paid at the rate of \$1,000 per annum, commencing July 1, 1917. Both of these applicants have held the rank of captain of police in the Police Department, and they are clearly entitled to the same benefits of this act as any captain of police heretofore retired.

We, therefore, most respectfully recommend that your board enter an order increasing the annual pension of both of these retired officers to \$1,000 per annum, commencing July 1, A. D. 1917.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Duty of Police Department in Respect to Making Out Complaints.

December 7, 1917.

HON. H. F. SCHUETTLER, General Superintendent of Police.
Dear Sir:

We have your letter of November 3, asking for an opinion as to whether or not it is the duty of the Police Department, under the law, to make out complaints for summons, informations and warrants in criminal cases and complaints in city cases in the Municipal Court.

We find nothing in the Municipal Court act which imposes any such duty upon the Police Department.

No ordinance of the City of Chicago provides that the police shall perform this duty. The functions of the Police Department are fully performed by the apprehension of the persons committing crimes or violating ordinances, assisting in the preparation of cases and in making the complaint.

By Section 3329, J. & A. Ann. Stat., it is provided that:

“Every police officer of the City of Chicago shall be *ex officio* a deputy bailiff of the Municipal Court and shall perform from time to time such duties in respect to cases within the jurisdiction of said court as may be required of him by said court or any judge thereof.”

This section refers to such duties as are in line with general police work. It is not reasonable to expect that police officers should be skilled in the science of criminal or *quasi*-criminal pleading. That is presumed to be the particular work of members of the bar.

We know of no reason why the rule in criminal or *quasi*-criminal cases regarding the preparation of the necessary pleadings in a case should be different than in civil cases. There the papers are prepared by the attorneys for the respective parties. Complaints for summons, informations and warrants in criminal cases and complaints in city cases in the Municipal Court are plaintiffs' pleadings and should be prepared by the attorneys for the plaintiffs, in criminal cases by the state's attorney, and in suits for violation of the municipal code by the prosecuting attorney.

We do not mean to intimate by this opinion that the Police Department should not continue to perform, as it has in the past in most instances, the clerical work involved in the preparation of the papers. The police are located at the stations and are in position to render valuable assistance in this respect. For reasons of economy, if for no other, the routine work should be done by the police. The ultimate responsibility for the correctness of these pleadings, however, rests not with the police but with the state's attorney or the city prosecuting attorney as the case may be.

Yours very truly,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Brittain Claim.

December 13, 1917.

HON. U. S. SCHWARTZ, Chairman Sub-Committee of Committee on Finance.

Dear Sir:

You turned over to this department a letter from the comptroller under date of December 6, 1917, in which he refers to several sums as balances from various bond issues which might be available to pay the claim of J. J. Brittain on account of work done on the Contagious Disease Hospital. The letter states that it would be advisable to have an opinion from the law department.

As we understand it, the opinion desired is with reference to which of these sums can be used for purposes of payment in case the claim is allowed, and that you do not at this time require any opinion concerning the merits of the claim.

We find that the City Council authorized an issue of bonds "for the purpose of acquiring the necessary sites and constructing a contagious disease hospital and other buildings for the Health Department," on February 19, 1912.

(Council Journal, p. 2816.) That another issue was authorized on February 9, 1914, "for the purpose of constructing a contagious disease hospital and of acquiring the necessary sites and constructing other buildings for the Health Department." (Council Journal, p. 3898.) Again, on March 1, 1915, the City Council authorized an issue "for the purpose of completing the Municipal Contagious Disease Hospital, including" etc., (Council Journal, p. 3771).

It appears from the papers in our possession that the claim in question arose out of a contract entered into under date of March 30, 1915, with Brittain and Bushnell, co-partners, trading as J. J. Brittain Company. The contract was for constructing additional foundation caissons for the hospital. It calls for payment from the corporate fund, but from the notation of the comptroller on same it would seem that the fund to be drawn on was the appropriation for contagious disease hospital construction fund derived from the bond issue. (See Council Journal 1914-15, p. 2932, appropriation 937X6.) This is further evidenced by the fact that there was no general corporate appropriation from which the money could be drawn. While the limit fixed by the Council order authorizing the contract is \$35,000 (Council Journal, March 29, 1915, p. 4117), it does not necessarily follow that this bond fund could not have been drawn on by appropriate council action for an additional sum if the amount lawfully to be expended exceeded that sum. Each of the three ordinances mentioned above included authority to use the funds derived from the bonds for this purpose.

It appears further that the City Council made other appropriations from the bond fund available at the time (See appropriation ordinance of 1915, Council Journal 1914-15, p. 2932), which would have exhausted the entire fund derived from the issues of 1912 and 1914 if the improvements contemplated had been made. But a part of these improvements have not been finished, and therefore there remains a balance of \$116,000 in that fund. Hence, if the Council sees fit to do so, it can transfer enough of this unexpended balance to the purposes of the hospital to take care of this claim.

There is also a balance undisposed of in the bond issue of 1915. We suggest that it would be advisable to draw on the balance of the fund in the 1915 bond issue first, to the extent that it will reach. We are told that this balance amounts to \$24,507.75. The reason for this is that if there is a shortage when the other improvements appropriated for are completed, such deficiency will probably have to be made up from the corporate fund, because this balance of the 1915 bond issue cannot be used for purposes other than in connection with the hospital. Since it can be used for hospital purposes, therefore, it should be drawn on first, so that the corporate fund may not suffer so much on account of the deficiency.

The Council cannot, of course, appropriate for a greater sum from a bond issue than the total amount derived therefrom. We do not understand that anything of that kind has been done, but that, so far as contracts were authorized, they were within the appropriations made and the total of such appropriations did not exceed the amount of the bond issue. It simply happens that through unforeseen circumstances there was additional expense incurred which the City Council may be disposed to allow as a lawful charge against the city that could properly have been appropriated for out of such bond issues. Under these conditions the City Council may make such transfers as may be necessary to authorize the payment of such claim, and then, if there is a shortage somewhere it will have to be made good out of the corporate fund.

The comptroller's letter makes mention of the bond issue of 1917. While it is possible to pay out of the proceeds of bonds on a contract that was in existence before the bonds were voted, such a thing can be done only where the authorization is absolutely clear in the ordinance. We do not think the bond ordinance of 1917 contained any such authority, and we, therefore, need not go farther into that matter.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Payment for Work of Splicing on Cummings Contract.

Chicago, Dec. 17, 1917.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

We have before us your letters of November 13, 1917, and December 1, 1917, relating to the claim of W. F. Cummings for work of splicing cable, under his contract, which you designate as No. 5734. Attached to the same are copies of the letters which passed between you and him on the subject.

It would seem that the controversy results from a difference of opinion as to what constitutes a "special condition" under which charges for the splicing of cables are authorized by the contract. It is probable that the interpretation we put on the contract will bring some of the charges within the terms of same, but this will not be on account of anything stated in the argument presented on behalf of the contractor, which we consider faulty throughout.

The specifications for the contract in question, which were merged in and made a part of the contract, contained the following provision under the heading, "Laying Cable."

"The cable shall be laid in the ground in continuous lengths and no splice shall be laid in the ground unless special conditions so require and in such case permission must be secured from the authorized representative of the commissioner of gas and electricity to install such splice in the ground."

The contract also contains a unit price of \$6.50 for splicing this kind of cable.

In our opinion there is only one reasonable construction which can be placed upon the two provisions. That is, that the splicing of such cable is undesirable and that the words "special conditions" refer to the physical conditions which make it necessary in some cases to do so, in which event the unit price for splicing is to be allowed. Thus, it is stated, in the argument submitted by the contractor, that the cable is not strong enough to pull in long lengths without injury, thereby making it necessary to lay same in open trenches, and

this in numerous instances compelled splicing where it was installed under street or alley crossings, curbs and sidewalks.

Such physical conditions are among the "special conditions" which the contract and specifications undertake to make provision for. There may be others. In all such cases the contract contemplates that the contractor should obtain permission to splice the cable and should be allowed compensation for such splicing.

But the permission to splice which the contractor asked for did not relate to such special physical conditions. It had reference to the waste which would result and the expense of which would fall on him in case the reel ends were not used. This cable comes in lengths averaging 1,500 feet to the reel. If the last length in the reel were to be discarded because the contract did not permit splicing, it would necessarily be to the disadvantage and loss of the contractor.

The contractor asked for permission to splice the cable so as to save these reel ends. He based his request on the fact that the extraordinary war conditions made the cable so scarce that unless reel ends were used there would not be enough to finish the work to be completed this year. It is true, he stated in his letter that if the permission was granted he wanted a record kept so that his bills for splicing would be paid. But the granting of the permission was not on account of physical conditions which made splicing necessary. Such permission was wholly for the benefit of the contractor. The city could not have been held responsible in case there had been a shortage of cable. The contractor could have been compelled to live up to his contract even though it would have put him to extraordinary loss. The granting of permission to use such reel ends, therefore, was not to be understood as authority to make the work cost more to the city by reason of the charge for splicing. Even if there would have been doubt on account of the attitude of the contractor, this doubt is entirely dispelled by your letters of August 29 and September 13, in both of which it is stated distinctly that you would not allow bills for such splicing on account of reel ends.

Under these circumstances, we are unable to follow what would otherwise be a very plausible argument concerning the

reasons why it was more practicable and to the advantage of the city that the cable should be ordered in reel lengths, instead of in special sizes as the contract contemplated. This argument is based on the theory that the scarcity of the material, the desire on the part of the city to have the work rushed, etc., created a "special condition" under which splicing was required and authorized, thereby making the work of splicing subject to compensation at the unit price.

We have shown above why we consider this argument faulty, and need only add that the contractor went ahead knowing your attitude in the matter, so that he had full knowledge that he would not be allowed pay for such reel end splicing.

We recommend that a survey be made of the conditions in order to ascertain which of the splices made are due to the saving of reel ends and which are due to physical conditions, and that, upon the completion of such survey, all splices which come within the latter class should be paid for at the unit rate fixed by the contract.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Award of Contracts by Board of Local Improvements.

December 22, 1917.

HON. WM. F. LIPPS, Chairman, Committee on Home Defense,
Chicago.

Dear Sir:

Replying to yours of December 11th, addressed to the corporation counsel requesting an opinion as to the legal right of the Board of Local Improvements to award contracts for local improvements when the contract price exceeds the total of the special assessment for such improvements, would say that the letting of such contracts is controlled by the provisions of Sections 75 to 81 inclusive of "An Act concerning lo-

cal improvements," in force July 1, 1897, and the amendments thereto.

These sections authorize the board to let contracts to the lowest responsible bidder whether his bid is greater or less in amount than the confirmed assessment.

Section 59 of the act provides that in case the assessment is insufficient to pay the contract price or the bonds or vouchers issued or to be issued in payment of such contract price a second or supplemental assessment, or if necessary, additional supplemental assessments, may be levied until sufficient money shall have been realized to pay for such improvement. Referring to this last mentioned section, the Supreme Court in the case of *City of Chicago v. Richardson*, 213 Ill., at page 98 says:

"Section 59 makes provision to meet the contingency of the assessment proving insufficient, in order that the work when finally completed, may be paid for. If that should happen, the amount of the deficiency can only be finally and definitely ascertained after the work has been performed. If the contract is let for more than the amount of the assessment, all that can be said is, that if the contractor performs the obligation on his part he will become entitled to the contract price, which will exceed the amount of the assessment. If he does not perform his obligation another contract must be let for the unfinished portion of the work, and under changed conditions the second contract may be for more or less than the amount of the forfeited contract. There might be cases where interest or other things might affect the amount of the deficiency, and in no case can the actual deficiency in the first assessment be known until the work has been performed. The deficiency is not necessarily fixed by the difference between the contract price and the assessment, * * * there could be another assessment on the re-letting of a forfeited contract or the happening of any other event which would increase the probable deficiency."

In *City of Chicago v. Noonan*, 210 Ill. 18, the same court, referring to the various above mentioned sections of the act, at page 23 said:

"The best estimate that can be made will generally, if not universally, prove too low or too high, and hence this section provides the means of increasing the assess-

ment if the estimate should prove too small, or for refunding ratably to those against whom the assessment was made the excess if the estimate should prove too large. Section 75 provides when the contract shall be let, and the next section (76) requires notice to be given, which 'notice shall state the time of opening such bids (not more than fifteen nor less than ten days thereafter.)' Section 77 authorizes the board of local improvements to reject any and all proposals or bids should they deem it for the public good, etc., and Section 78 provides: 'Any owner or person interested in any of the property assessed and any bidder shall be entitled to a hearing before said board on any question connected with any such award.' Then follow the requirements of Section 79 that notice of the award of the contract shall be published. Section 80 provides that the owners, or a majority of them, under certain conditions, may do the work, and concludes: 'Should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days, or to commence the work within thirty days after the first posting and publication of said award, and to prosecute the same with diligence, it shall be the duty of the board of local improvements to enter into a contract with the original bidder to whom the contract was awarded, and at the price specified in his bid.' None of these sections limit the board to the amount of the assessment in entering into the contract for the work, but, on the contrary, seems clearly to indicate that it may let the contract to the lowest responsible bidder, whether his bid is greater or less in amount than the estimated cost of the improvement."

It may be said here, that an original assessment cannot be levied for an amount in excess of the engineer's estimated cost of an improvement, which, as indicated in the court's opinion above, may prove too high or too low.

Respectfully submitted,

GEO. P. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Leave of Absence to Fireman Under Arrest.

December 24, 1917.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

We are in receipt of your communication of December 11, 1917, requesting us to advise you whether or not you would be acting within your authority if you should grant the request of William Keogh, an assistant engineer in the Fire Department, for a year's leave of absence.

In your communication you state that Keogh is now confined in the county jail and that he has been indicted by the grand jury on serious charges; that there are four other members of the Fire Department involved in the same case and that all five of them are under suspension at the present time.

In your communication you also advise us that when you suspend men for violation of the criminal laws, you do not bring them before the Civil Service Commission for trial until after the criminal charges have been disposed of in the criminal court, and that if they are found guilty in court the evidence introduced against them by the state in the criminal trial is presented to the Civil Service Commission, and upon that record the Civil Service Commission disposes of the charges pending against them before that body.

In reply, we beg to advise you that under the Civil Service Law the head of a department has the power to suspend an employe for a period of time not exceeding thirty days, and unless the head of the department files charges against the employe within thirty days from the date of suspension, under the Civil Service Law the employe is entitled to be reinstated in his position.

We consider the policy of the Civil Service Commission, in not insisting upon trying civil service employes who are charged with violations of the criminal code until they are first tried in the criminal court of Cook county, a wise and proper rule. Keogh is now confined in jail, and, under the law of the State of Illinois, must be tried on the indictment pending against him within four terms of the criminal court

of Cook County, and if he is not tried within four terms and remains confined in jail during all that period or time, he is entitled to his release and can secure the same by filing a writ of *habeas corpus*. In view of Keogh's predicament, we think he is adopting a proper course in applying for a leave of absence until the criminal charges pending against him are disposed of, when he may have an opportunity of appearing for trial before the Civil Service Commission in order that he may defend himself against any charges that may be filed against him with the Civil Service Commission.

The mere fact that one of your employes may be indicted by the grand jury of Cook County does not in any way deprive you of the authority of dealing with any request made of you as fire marshal by such employe.

In view of the fact that Keogh will not be tried by the Civil Service Commission until the indictment now pending against him is tried in the criminal court of Cook County, we would respectfully recommend that he be granted a leave of absence in accordance with the rules of the Civil Service Commission and the Fire Department of the City of Chicago for such period of time as you may deem proper, providing such leave of absence shall not be granted for a period of time less than six months. We are of the opinion that his case in the criminal court ought to be disposed of within six months from this date, and, if it is not, that a further extension of his leave of absence may be granted.

Yours very truly,

JAMES W. BREEN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Regulation of Cabarets.

December 28, 1917.

HON. JOHN TOMAN, Chairman, License Committee.

Dear Sir:

We are in receipt of your letter of the 24th instant in which you ask an opinion on three questions as follows:

"1. What powers under the present state laws and city ordinances has the chief of police to regulate and control dram shops and dram shops where cabarets are conducted?"

"2. Are the present state laws and the city ordinances insufficient to control the evils complained of in the public press and the Morals Court resulting from the operation of cabarets under the present system?"

"3. If additional legislation is needed, what form should it take and what are the powers of the City Council in relation thereto?"

Paragraph 46 of Section 1 of Article V of Chapter 24 of the Revised Statutes (Cities and Villages Act) reads as follows: (Hurd's Statutes, 1915-1916, page 306.)

"Sec. 1. The City Council in cities * * * shall have the following powers:

* * * * *

"Forty-sixth. To license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: *Provided*, that the City Council in cities, or presidents and boards of trustees in villages, may grant permits to druggists for the sale of liquors for medicinal, mechanical, sacramental and chemical purposes only, subject to forfeiture, and under such restrictions and regulations as may be provided by ordinance: *Provided, further*, That in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses."

Sections 1 and 2 of Chapter 43 of the Revised Statutes (Dram Shops Act) read as follows: (Hurd's Statutes, 1915-1916, page 1081.)

"§1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That a dram shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"§2. Whoever, not having a license to keep a dram shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or

in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than twenty dollars (\$20) nor more than one hundred dollars (\$100), or imprisoned in the county jail not less than ten nor more than thirty days, or both in the discretion of the court."

In this chapter it is further provided how licenses may be granted and the act contains provisions against selling or giving intoxicating liquors to a minor or drunkard. It is further provided that "all places where intoxicating liquors are sold in violation of this act, shall be taken, held and be declared to be common nuisances, and all rooms, taverns, eating houses, bazaars, restaurants, drug stores, groceries, coffee houses, cellars, or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be deemed public nuisances." There are several other provisions in this chapter of the statute which we deem it unnecessary specifically to mention at this time.

Sections 259 and 260 of Chapter 38 of the Statutes (Criminal Code) read as follows: (Hurd's Statutes, 1915-1916, page 926.)

"§259. Whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not exceeding \$200.

"§260. Sunday shall include the time from midnight to midnight."

Manifestly, these statutes are of superior force to ordinances passed by the City Council; and ordinances in conflict with these statutes are void.

We refer to the statutes above quoted because it is our understanding that it is thought that the principal evils resulting from cabarets will be cured if cabaret performances are not allowed in dram shops or places where intoxicating liquors are sold or given away; and further, because to say the least, the power of the city to regulate cabarets in places where intoxicating liquors are not sold or given away is far less comprehensive than the power to regulate them in places where intoxicating liquors are sold and given away. (*City of*

Chicago v. Drake Hotel Company, 274 Ill. 408; and provisions of the statutes cited, *supra*.)

For practically half a century the Sunday Closing Law was not enforced in Chicago and many of the present ordinances were passed upon the assumption that said law would not be enforced; and it is a condition which must be recognized that the ordinances relating to the liquor traffic and businesses conducted more or less in connection therewith are in a state of considerable confusion and conflict; so that it is sometimes very difficult, if not quite impossible, to ascertain their meaning and apply them with certainty.

It seems to us to be highly important that there should be a general revision of the ordinances relating to the liquor traffic and businesses conducted more or less in connection therewith, to the end that the existing uncertainty, conflict and confusion shall be removed, and that they shall be made to conform to the state laws as now enforced.

One especial necessity is that the City Council shall clearly define what premises are to be regarded as included within the dram shop or place where liquor is sold or given away. Then, when that is done, it may be further necessary to prescribe and regulate cabaret performances in such places; that is to say, merely for illustration, the Council may, if it sees fit, forbid cabaret performances in the bar-rooms or dram shops proper and allow them, under proper regulations, in restaurants and parts of hotels where liquor is served but not sold, or may allow such performances only in places where no liquor is served or consumed.

In short, it is essential that certain and uniform rules should be prescribed for the government of the businesses referred to.

The City Council is vested with the power and is charged with the responsibility of prescribing such rules by ordinances. The general superintendent of police is an executive officer charged with the enforcement of the laws and ordinances. He has no legislative powers. He cannot change or amend or pass ordinances. He can only do his best to interpret and enforce them as he finds them; and, as we have before pointed out, the difficulties in the way of his interpreting

and applying the existing ordinances, which are now under consideration, are practically insurmountable.

So, in consideration of the foregoing, our answer to your questions Nos. 1 and 2, is that, in our opinion, the general superintendent of police has not, under the present ordinances, adequate power to regulate and control dram shops and dram shops where cabarets are conducted, for the reason that, in the confused and conflicting state of these ordinances, it is practically impossible for him to determine, with certainty, what the ordinances mean; and consequently that the existing ordinances are insufficient to control the evils complained of in the public press and the Morals Court resulting from the operation of cabarets under the present system.

The state laws seem to be clear enough so far as they go; but they are general in their terms, leaving the details of regulation to be worked out by the City Council, provided, of course, that the ordinances passed by the City Council must not come in conflict with the state laws.

Our answer to your question No. 3 is that, in our opinion, the City Council has power to regulate the cabaret evils and especially when such regulation is done in the exercise of the Council's power to regulate the liquor traffic; and that a general revision of the ordinances relating to the liquor traffic and the businesses conducted in connection therewith is essential so that certain and uniform rules shall be prescribed for the guidance of the executive branch of the city government in regulating such places.

In this connection we may be permitted to state that the general superintendent of police has asked for our opinion as to what action he is authorized to take under the bonds which are given by dram shop keepers.

You will perceive at once that arrests cannot be made or prosecutions maintained or dram shops summarily closed by virtue of the provisions contained in such bonds. The bonds do not constitute laws or ordinances, but are merely contracts. Hence the only action that can be taken under these bonds is to bring suits upon them; and, in that event, the question will arise for the courts to determine whether or not the provisions

in the bonds, which are not provided for by the ordinances, are valid.

We entertain no doubt that the general superintendent of police will do his best to enforce all the laws and ordinances relating to the liquor traffic and cabarets; but, for the reasons before stated, his efforts, under the existing ordinances, will be largely ineffective, because of the confusion and conflict which exists in such ordinances. The only way, in our opinion, to get the desired results is for the City Council, by proper ordinances, clearly and definitely to direct the general superintendent just what to do in these matters; and when that is done both he and the courts will be in a position to practically eradicate the existing evils against which complaint is made.

Very truly yours,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Ordinance Licensing Filling Stations.

January 4, 1918.

HON. ROSS A. WOODHULL, Alderman, 8th Ward.

Dear Sir:

We are in receipt of a communication of December 24, transmitting a copy of an ordinance licensing filling stations for the sale of gasoline and similar products, with a request that we render an opinion to the License Committee as to the legality of said ordinance.

Section 1 of the ordinance provides that for the purpose of said ordinance any room, building, place, lot, yard, plant or premises where a container or containers, tank or tanks, either portable or stationary, and containing inflammable liquids as defined in Chapter 1 of an ordinance regulating the manufacture, storage, use, sale or distribution of inflammable liquids, as passed by the City Council of the City of

Chicago on March 29, 1915, and subsequently amended, are kept or located for the purpose of selling, offering for sale or distributing such inflammable liquids from such containers, shall be deemed a filling station.

An examination of the ordinance of March 29, 1915, discloses the fact that the following liquids are classed and designated as inflammable liquids within the meaning of the ordinance:

“Ether, carbon, bisulphide, gasoline, naphtha, benzole, collodion, hydrocarbon (gas drips), liquefied petroleum gas, acetone, amyl acetate, kerosene, amyl alcohol, turpentine.”

Section 2 of the ordinance forwarded to us with your communication provides that no person, firm, co-partnership or corporation shall keep, operate or maintain a filling station without first having obtained a license.

Paragraphs 65 and 66 of Chapter 24 of the Cities and Villages Act, page 307 of Hurd's Revised Statutes of 1915-1916, confer upon the City Council the following powers:

“Sixty-fifth. To regulate and prevent storage of gunpowder, tar, pitch, resin, coal oil, benzine, turpentine, hemp, cotton, nitro-glycerine, petroleum, or any of the products thereof, and other combustible or explosive material, and the use of lights in stables, shops and other places, and the building of bon-fires; also to regulate, restrain and prohibit the use of fireworks, firecrackers, torpedoes, Roman candles, skyrockets, and other pyrotechnic displays.

“Sixty-sixth. To regulate the police of the city or village, and pass and enforce all necessary police ordinances.”

In *Gundling v. The City of Chicago*, 176 Ill. 340, it was held by the Supreme Court of the State of Illinois that an ordinance may derive its validity from several grants of power, and does not depend upon any single clause or section of the statute containing such grant.

In the case of *Spiegler v. City of Chicago*, 216 Ill., p. 114, in discussing an ordinance licensing tank wagons or other vehicles hauling oils in the City of Chicago, the court said:

“The various oils named in the ordinance are known to all to be highly combustible, and under some condi-

tions and unless handled with care, explosive, and they have been recognized by the Legislature of this state (City and Village Act, Art. 5, Sec. 1, Subd. 65), and by this court (*Standard Oil Co. v. City of Danville*, 199 Ill. 50), to be dangerous in character. By the City and Village Act the City of Chicago is given power to pass and enforce all necessary police ordinances. By the word 'necessary,' indispensable was not intended, but power was conferred upon the city to pass all ordinances which would be conducive to the promotion of the health, safety and welfare of its inhabitants, which power we think may reasonably be held to include the power to pass an ordinance regulating in a reasonable manner the handling of the oils mentioned in the said ordinance, in 'tank-wagons or other wagons or vehicles' upon the streets of the City of Chicago."

In the suit of the *Standard Oil Co. v. The City of Danville*, 199 Ill., page 50, the court, in passing upon the validity of an ordinance of the City of Danville making it unlawful for any person, firm or corporation to keep or store any petroleum, naphtha, benzine, gasoline, coal oil or any of the products of petroleum, or any inflammable or explosive oils within the space of 1,000 feet of any dwelling house, store room, building, barn, shed or other like structure within the corporate limits of the City of Danville, in a quantity greater than 5 barrels of 50 gallons each at one time, held that under Paragraph 65 of the Cities and Villages Act, which paragraph we have quoted above, the General Assembly

"expressly conferred upon the city the power to adopt the ordinance. All presumptions are in favor of its reasonableness, and such presumptions must prevail, nothing to the contrary appearing on the face of the ordinance or from the proofs."

In our opinion, the City Council has express power to regulate the handling of inflammable liquids of the character sought to be regulated by the ordinance in question, and, under the ruling of the Supreme Court in the case of the *City of Chicago v. The M. & M. Hotel Company*, 248 Ill., page 271, the City Council possesses the power to pass and enforce all police ordinances which may be necessary in reference to the subjects and occupations, the regulation and control of which are expressly delegated to the municipality.

In the case of *Condon v. The Village of Forest Park*, 278 Ill., page 224, the Supreme Court, in discussing the question of the police power of the municipality, said:

“Under the police power, things which are injurious to the public may be suppressed and prohibited, and other things which may or may not be injurious to the public, according to the manner in which they are managed, conducted and regulated, may be licensed for the purpose of regulation.”

The City Council has no express power to license filling stations, but, in our opinion, when filling stations are places where oils of an inflammable and explosive character are kept in large quantities for the purpose of supplying the public who desire to purchase the same, it has the power to exact a license fee for the purpose of regulating such places, and for that purpose may impose a reasonable license fee.

In discussing the question of such license fee, the Supreme Court, in the case of *Condon v. Village of Forest Park*, *supra*, at page 225, said:

“Another rule of law is, that in the exercise of the police power for the purpose of regulation the authority of a municipality is limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed by the business or occupation licensed and the necessary expense involved in police supervision.”

In the case of *Spiegler v. City of Chicago*, *supra*, the ordinance provided:

“A license fee of \$10 should be paid for each ‘tank or other wagon or vehicle’ (engaged in hauling oil) for a full year or a proportionate part of that sum for a fractional part of a year, and when so construed the license fee fixed by the ordinance is not unreasonably high,—at least not so high as to justify a court in holding the ordinance void by reason of the amount of the license fee fixed by the ordinance. In *Price v. The People* (193 Ill. 114), it was held that the amount fixed by legislative power to be paid as a license fee is conclusive unless it is manifest that its real purpose is to raise revenue under the guise of a police regulation or to prohibit the exercise by the citizen of a lawful calling by means of an oppressive license fee.”

While we are satisfied that the City Council possesses the power to license filling stations for the purpose of regulation, we respectfully desire to suggest that Section 1 of the ordinance in question should be amended, and that that portion of it referring to the ordinance passed by the City Council of the City of Chicago on March 29, 1915, be stricken out, and that the inflammable liquids mentioned in said ordinance be specifically mentioned in Section 1, in order that the kind and character of liquids the Council desires to regulate may clearly appear from the face of the ordinance.

The matter of the reasonableness of the license fee for filling stations is a question for the City Council in its wisdom to determine, and in determining that fact the Council should have in mind that it has no power to tax filling stations for the purpose of raising revenue for the city. The chief of the Bureau of Fire Prevention and Public Safety should be consulted by the members of your committee, in order that you may be able to ascertain the amount of expense the city will have to incur in order to comply with the provisions of this ordinance, and the license fee imposed should be sufficient to cover such expense.

The question of the reasonableness of the license fee is one that the courts may be called upon to determine, and care should be exercised by your committee in fixing the amount of the license fee for filling stations, so that persons desiring to contest the validity of this ordinance will not be able to prove that the fee fixed in the ordinance is excessive or unreasonable.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Amber Tinted Headlights on Automobiles.

January 4, 1918.

HON. HERMAN F. SCHUETTLER, General Superintendent of Police.

Dear Sir:

Complying with your written request for a written opinion under date of December 5, 1917, your number 38547 as to "whether or not an amber colored (yellow tint) headlight for use on automobiles, or any other colored headlight would be in compliance with Section 4 of the Illinois Motor Vehicle Law of 1911 as amended June 26, 1917, in force January 1, 1918, appearing on pages 686-687 both inclusive of the printed Session Laws of Illinois, 1917, which for more certainty is here set out in full:

"AN ACT to amend an act entitled, 'An Act defining motor vehicles and providing for the registration of the same and of motor bicycles, and uniform rules regulating the use and speed thereof; prohibiting the use of motor vehicles without the consent of the owner and the offer or acceptance of any bonus or discount or other consideration for the purchase of supplies or parts for any such motor vehicle or for work or repairs done thereon by others, and defining chauffeurs and providing for the examination and licensing thereof, and to repeal certain acts therein named,' approved June 10, 1911, in force July 1, 1911, as subsequently amended, by amending Sections 3, 4, 7, 8, 12 and 13 thereof, and by adding thereto one new section to be known as Section 15b.

* * * * *

§4. When upon any public highway in this state, during the period from sunset to one hour before sunrise, every motor bicycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights visible at least two hundred (200) feet in the direction toward which each motor bicycle or motor vehicle is proceeding and shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction. The number plate at the back of the motor vehicle provided for in Section Three (3) shall be firmly attached to the vehicle, so that it will not swing loosely, and shall be so lighted that

the numbers on said plate shall be plainly legible and intelligible at a distance of one hundred fifty (150) feet: On approaching another vehicle proceeding in an opposite direction, and when within not less than two hundred and fifty feet of same, any person in charge of a motor bicycle or motor vehicle equipped with electric headlight or headlights, shall dim or extinguish such headlight or headlights. During the period from one hour after sunset to one hour before sunrise every motor bicycle or motor vehicle which is standing on any road, highway or street shall display a light on the front and at the rear of the same."

This matter has received our careful attention and we take note of what you state with reference to your understanding of the words "*white lights*" as used in said Section 4 of the Motor Vehicle Law and the construction you place thereon in Circular Order No. 242 issued under date of November 15, 1917, to commanding officers over your signature as superintendent of police:

"CITY OF CHICAGO
OFFICE OF THE

GENERAL SUPERINTENDENT OF POLICE.

To Commanding Officers: November 15, 1917.
Circular Order No. 242:

Complaint has been received that a large number of automobiles are using colored headlights in violation of Section 269-D, Chapter 121, Revised Statutes, which requires that every motor vehicle shall carry two lighted lamps, showing white lights visible at least two hundred feet in the direction in which vehicle is proceeding. Instead of white lights being used, there is a tendency to use amber colored lights, green lights, and even red lights.

You will instruct your officers to give this matter their careful attention and see that the state law covering this matter is enforced.

(Signed) H. F. SCHUETTLER,
General Superintendent."

The Honorable Edward J. Brundage, attorney general of the state, has given an opinion as to the proper construction of the above statute so far as it relates to "*white lights*," which opinion is as follows:

“State of Illinois,
Law Department,
Springfield.

Edward J. Brundage,
Attorney General.

December 4, 1917.

Hon. Louis L. Emerson,
Secretary of State,
Springfield, Illinois.

Dear Sir:

The law in relation to motor vehicles prescribes white lights on the front of such vehicles, and red lights on the rear.

There is a disposition on the part of certain municipal officials to hold that a yellow light is not in compliance with the law.

A reasonable construction should be given to the law, as strictly speaking, there is no such thing as a white light.

In my opinion, the Noviol Conaphore meets the requirements of our statute.

Yours very truly,
EDWARD J. BRUNDAGE,
Attorney General.”

Inasmuch as this inquiry involves a construction of a state law and the chief law officer of the state has construed it, we believe that his opinion should control until finally passed upon by the courts, and, hence, that you should regard such “yellow lights” as coming within the term “white lights” as used in the statute, unless and until there is a proper court decision to the contrary. It is our opinion that you will be warranted in preventing the use of front lights of a darker hue than yellow.

Very truly yours,

EDWARD J. SMEJKAL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Federal Income Tax of City Employees.

January 5, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your communication addressed to the corporation counsel wherein you wish to be advised if the salaries of city employes are exempt under the Federal Income Tax Law, and if not how should the tax be collected, has been referred to the undersigned.

In reply thereto we beg to say Section 4 of Income Tax Act of September 8, 1916, as amended by act of October 3, 1917, reads in part as follows:

“Sec. 4. The following income shall be exempt
* * * the compensation of the present President of the United States during the term for which he has been elected and the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employes of a state, or any political subdivision thereof, except when such compensation is paid by the United States Government.”

It will be noted this section excludes the compensation of all officers and employes of a state, or any political subdivision thereof, except when such compensation is paid by the United States Government. The question therefore becomes whether or not a city is a political subdivision of a state so as to come within the provision of said act.

The Supreme Court of the United States in *Jefferson City Gas Light Company v. Clark*, 95 U. S. 644, on page 654, said:

“A city is only a political subdivision of a state, made for the convenient administration of the government.”

It clearly appears that a city is a political subdivision of a state, and therefore we are of the opinion the income tax does not apply to salary or compensation received by officers or employes of the city.

Having decided the income tax does not apply to the salaries of city employes there is no necessity for a reply to your second question.

Very truly yours,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved: .

SAMUEL A. ETTELSON,
Corporation Counsel.

Regulation of Telephone Rates.

January 9, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication addressed to this office, relative to the matter of the regulation of telephone rates during the year 1918, has been given careful consideration.

The specific question which you ask is whether or not the city will lose any of its rights providing it does not take up for consideration the question of the regulation of rates.

In reply thereto, I beg to state that the ordinance regulating the terms and conditions upon which the Chicago Telephone Company may operate within the City of Chicago was passed November 6, 1907, and accepted by the Chicago Telephone Company almost immediately thereafter.

By the acceptance of the ordinance of 1907 a binding contract was entered into between the City of Chicago and the Chicago Telephone Company, which contract cannot be annulled or avoided by either of the contracting parties without the consent of the other.

People v. Chicago Telephone Company, 220 Ill. 238, page 247.

In accordance with the terms of the said ordinance the City Council took up the question of the regulation of rates in the latter part of the year 1912 and enacted an amendatory ordinance covering the question of rates on May 26, 1913. This amendatory ordinance so passed was accepted by the

company and the rates therein fixed will remain in full force and effect until the 26th day of May, 1918.

Section 7 of the ordinance of November 6, 1907, provides that the rates fixed and established for any period "shall not be fixed by the City Council to continue for more than or less than five years, etc."

The specific requirement of the ordinance is that the rates fixed by any amendatory ordinance accepted by the company shall continue for a period *not less than nor more than* five years. This phraseology establishes an exact five year period, which can neither be lengthened nor shortened at the will of either contracting party.

It necessarily follows then that the city cannot avoid the question of the enactment of an amendatory ordinance fixing telephone rates for the ensuing five years following May 26, 1918.

Should the City of Chicago fail to enact an amendatory ordinance in accordance with the ordinance of 1907 and thereby establish the rates for the next five year period, the company might take it upon itself to fix the rates in accordance with its own desires and ignore the City of Chicago, because of the failure of the city to take affirmative action; or the company might apply to the State Public Utility Commission and ask that body to fix and determine reasonable telephone rates for the City of Chicago, thus ignoring the City Council and the city representatives.

From the foregoing it can be seen that some of the most valuable rights the city now possesses may be lost as a result of any inaction at this time on the part of the City Council, and it would be to the best interest of the city, in my opinion, that some affirmative action be taken.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Refund from Municipal Pension Fund.

January 10, 1918.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL PENSION FUND
OF THE CITY OF CHICAGO.

Dear Sirs:

We beg to acknowledge receipt of your communication of December 19th requesting us for an opinion as to the power and authority of the Board of Trustees of the Municipal Pension Fund to refund fifty per cent of the amount received to the estates of deceased contributors who have died while receiving a pension for disabilities.

The Board of Trustees has power, and it is its duty, to grant refunds in accordance with the provisions of Section 4 of the Municipal Pension Fund Act. Section 4 of said act, applicable to the question under consideration, provides as follows:

“SECTION 4. Said board shall have the power, and it shall be its duty, * * *

Sixth: To authorize the payment to any employe who may be separated from the service of such city, village or town by the abolishment of his or her position before such employe shall have qualified for a pension of an amount equal to the amount deducted from the salary or wages of such employe and applied to the fund hereby created, to any employe who may be separated from the service of such city, village or town by resignation or discharge, before such employe shall have qualified for a pension, and to the heirs and legal representatives of any employe who shall die while in the service of such city, village or town, of an amount equal to one half of the amount deducted from the salary or wages of such employe and applied to the fund hereby created; *Provided*, that all such employes and the heirs and legal representatives of any deceased employe shall release said board from any future liability upon receipt of such amounts.”

You will observe from a reading of the above paragraph of the statute that the board is granted authority to refund the money to any employe of the city who may be separated

from the service by the abolishment of his or her position before such employe shall have qualified for a pension, of an amount equal to the amount deducted from the salary or wages of such employe; and the board is also authorized to refund fifty per cent of the amount deducted from any employe who may be separated from the service of such city, village or town by reason of discharge before such employe shall have qualified for a pension, and that the board is authorized to refund to the legal representatives of any employe *who shall die while in the service of any city, village or town* an amount equal to one-half of the amount deducted from the salary of such employe. On the other hand, the Municipal Pension Board has no power or authority to grant a refund to the legal representatives of any of the participants of the fund unless the participant was in the employ of the city at the time of his death. In your communication it appears that Robert W. Sproule and Joseph Weber were both retired from the service of the city, and were receiving pensions under the disability section of the Municipal Pension Fund Act. Under the law, no person can receive a pension until after his retirement from the service of the city, and the board has no authority to refund money to the legal representatives of any contributor unless that contributor was an employe of the city at the time of his death. To hold that an employe in the classified service of the city should retire from such service on account of disability and apply to the board for a pension, and have his application for a pension granted, and receive from the Municipal Pension Fund an amount of money often several times greater than the entire amount paid in by said contributor, and then, at his death have his legal representatives apply for and receive a refund of fifty per cent of the amount contributed to said fund by the employe while in the service of the city, would not only be very unfair to the participants in the fund but we could only justify such a ruling upon a clear provision in the law. The law does not so provide, and we are inclined to the opinion that in providing that the employe must die while in the service, the General Assembly clearly intended

not to grant your board authority to grant a refund to the legal representatives of any participant in the fund who prior to his death had been granted a pension under the provisions of the law.

We would, therefore, respectfully recommend that you deny the applications of the widows of Robert W. Sproule and Joseph Weber for a refund of fifty per cent of the amounts contributed to the Pension Fund by their deceased husbands during the time they were employed by the city.

Yours very truly,

J. W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Unclaimed Rebate Fund.

January 14, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter concerning the payment of the principal and interest on three over-due special assessment bonds. These bonds are numbered respectively P-17049, P-17830 and P-21526, and the same were forwarded to us with your letter.

Attached to your letter was also a memorandum from the clerk in charge of special assessment matters showing how it happened that there were unpaid balances on said bonds. We have not made further inquiry in regard to the reason for the deficiency than to note what is said in that memorandum, nor have we gone into the reasons for paying same at this time. These are matters which are to be determined by the Board of Local Improvements and the Department of Finance. The only question before us on which you want an opinion, as we understand it, is as to whether the payments can be legally made. In other words, we do not pass on the propriety of charging up to public benefits

the deficiency caused by the withdrawal from collection of certain of the installments shown by this memorandum to have been so withdrawn.

The City Council, in the annual appropriation bill for 1917, set aside the sum of \$50,000 to be used for retiring outstanding special assessment vouchers and bonds which may be delinquent, etc. The bonds before us come within that class, and having been selected for payment, could have been paid out of that appropriation. They were included in a supplemental list as properly chargeable to public benefits which was submitted to the Committee on Finance on February 16, 1917. We understand, however, that it was determined later to pay these out of unclaimed rebates instead of out of the general corporate fund.

The law permitting the use of unclaimed rebates by transferring same into an "unclaimed rebate fund" after the expiration of eight years was approved May 26, 1917, and became operative July 1, 1917. Section 5 of said act is as follows:

"Sec. 5. Any city, town or village having an 'unclaimed rebate fund' created as herein provided may by ordinance direct the use of the money in such fund for the purpose of paying all rebates or refunds due on warrants for any special assessment or special tax, or for the purpose of paying unpaid special assessment vouchers or special assessment bonds, or special tax voucher, or interest, or deficiency in interest, or public benefits, or for the purpose of purchasing any lot, block, tract or parcel of land or any real estate at any sale had to enforce the collection of special assessments or special taxes, *provided, however*, that said ordinances shall prescribe and limit by specific appropriation, the amount of such money in such fund to be used for each of said enumerated purposes respectively."

It will be seen from the above that whenever the City Council directs by ordinance that a fixed sum of money in the "unclaimed rebate fund" may be used for paying unpaid special assessment bonds and interest or for paying public benefits (among other things), it is proper to draw against said fund.

The City Council by ordinance created such an "unclaimed rebate fund" on October 1, 1917. (Council Journal, p. 1103.) It has since made further additions to the fund.

On June 29, 1917, the City Council passed an ordinance appropriating, among other things, the sum of \$6,602.73 "for payment of public benefits and interest (1917 supplemental)" out of a special fund "to be known as the unclaimed rebate fund 'which it is proposed to create,' " etc. (Council Journal, p. 907.)

We regard the passage of such an appropriation ordinance before the fund was created as somewhat irregular, yet we cannot say that it is invalid for that reason. It was undoubtedly passed on the date mentioned in order to bring the appropriations made therein within the provisions of the statute permitting additional and supplemental appropriations after the passage of the appropriation bill but during only the first six months of the fiscal year. The act had already been signed by the governor and was a law. Therefore the ordinance was not of a speculative nature but was merely in anticipation of another ordinance which the Council intended to pass.

Such payments being authorized by law, and the Council having taken appropriate action concerning same, we are of the opinion that the contemplated payments may be lawfully made.

We return herewith the three bonds designated above.

Yours truly,

LEON HORNSTEIN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Consolidation of Purchases for the City of Chicago.

January 17, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter, asking whether there are any powers granted by statute to the commissioner of

public works or any employe of the Department of Public Works with respect to contracting for or purchasing labor, material or supplies for the use of said department. In reply, we beg to state that there is at the present time no statutory provision which gives the commissioner of public works or any one else in that department authority to incur obligations or make contracts, above and beyond what is delegated to him by the City Council.

The Cities and Villages Act mentions the commissioner of public works specifically only at one place. That is with reference to the letting of contracts by day labor (Art. IX, Sec. 50, Hurd's Rev. St., 1915-1916, p. 320). This section states that the commissioner of public works "or other proper officers to be designated by ordinance" shall have the control of such work and shall employ the persons who are to do it. This does not give the commissioner exclusive jurisdiction, but simply designates him as an officer to whom the power may properly be delegated by ordinance.

Under the former charter the authority which is now vested in the commissioner of public works and in the Board of Local Improvements was lodged in the Board of Public Works. That board was given express power to advertise for bids and contract for work, materials, etc. We regard that provision of the former charter, however, as entirely inconsistent with the provisions of the Cities and Villages Act, in which no Board of Public Works is created or recognized. The provisions of the later act supersede the former charter provision that we have mentioned.

The city ordinance (Sec. 2078) says:

"The commissioner of public works shall, in all matters whereby, by reason of any ordinance, resolution, agreement or act heretofore passed, entered into or done, the action of a Board of Public Works is necessary, constitute a Board of Public Works for such purpose, and shall do and perform all things required to be done by or imposed upon said board."

This provision of the ordinance is not intended to give the commissioner the powers which the Board of Public Works formerly had, but is intended merely to substitute the com-

missioner as the person having the authority to proceed in all matters wherein the Board of Public Works, before the adoption of the new charter, had been named by statute, ordinance, etc., as the body to act. It does not keep in force those provisions of the statute or former charter which were designed to give the Board of Public Works powers to contract independent of the City Council.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Checking up on Hay and Feed Deliveries.

January 21, 1918.

HON. MORRIS ELLER, Inspector of Weights and Measures.

Dear Sir:

Your request for an opinion as to your authority to deputize a man not in the employ of the city for the purpose of checking up and re-weighing hay and feed deliveries, and prosecuting in cases of short weights, was referred to the undersigned for consideration and reply.

It appears from your letter that there is much complaint concerning shortage of weight in the hay and feed business, that such dishonesty on the part of some dealers results in a condition that is unfair to the honest dealers, and that by reason of these facts an association has been formed of a majority of the dealers in this line with a view to changing these conditions. It further appears that this association has requested you to detail one or two of your men to go with its agents for the purpose of following and re-weighing deliveries, that you are unable to give them such assistance because six of your men were dropped by the City Council on account of lack of appropriations in 1917 and that now two more have been taken from you; and that the association now proposes to pay the salaries of such inspectors as you

assign to that work so that there will be no extra expense to the city.

The question that presents itself is whether you can legally appoint or deputize a man whose salary is paid by outside parties in this manner so as to give him some official standing and whether you would personally be liable on your bond for his acts.

As we understand the situation, the work which is expected from the persons that the association is calling for is of such a nature that if there were employes in your department available you would be willing to deputize them for the purpose, and to the extent that you are unable to grant the request the interests of the citizens will suffer. While it might appear to you that this gives you the right to adopt some one employed by the association as a substitute, we are unable to find any law or ordinance under which you could clothe such a person with official authority. If such person is only wanted for the purpose of securing information and in order to have an additional witness in case of prosecution, the association would have no occasion to make any request of you—it could go right ahead and employ the man or men wanted for this purpose. But it is plain that these parties want an official inspector with such police powers as a deputy inspector of weights and measures has under the ordinances of the city.

The law does not contemplate that the city will be unable to supply officers and employes necessary for conducting its affairs, and therefore gives no power to the head of a department to create positions requiring the exercise of authority without pay. There is an exception to this in the case of special policemen, but the very fact that the ordinances make provision for special policemen emphasizes the point we make that, as to other officers or employes exercising official functions, there is no power in the heads of departments to create positions or appoint persons to positions that are not created by the legislative authority of the City Council.

There is, of course, nothing in the law which prohibits an executive officer of the city from accepting assistance from outsiders even to the extent of the regular employment of

some one without compensation from the city, provided the duties of such person are not of such a nature that he is acting in an official capacity. To illustrate, there was an organization which for a long time assisted in the cleaning of down-town streets with a regular force of employes, but this was done independently and not as a part of the municipal activities of the Department of Public Works—the association which employed the men was itself responsible to them and to the public—and the employes in question made no attempt to exercise authority.

In the same way, if you deem it desirable to do so, you can guide and instruct the employes of the association which wants to employ the men in the present instance. But if you do, we suggest that you impress it on both the employes and the members of the association that you are not to be regarded as in any way responsible for their work or liable for their acts, and that in their dealings with the public they should not conduct themselves so as to convey the impression that they are acting officially. Even then you would run some risk of being held accountable in case some aggrieved party assumed that they were acting under color of authority. The city would in no event be liable for any wrong done by persons so employed. Hence, if any liability attached outside of the liability of the association or its members, it would be your personal liability.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Purchase of Tires on Standardized Specifications.

January 24, 1918.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

You turned over to this department letters from the Chairman of the Committee on Finance and from the busi-

ness agent of the city in relation to the purchase of automobile tires for all departments on standardized specifications.

It appears that the matter has been under consideration for some time, and that, as a result of the conferences between the comptroller, the business agent and the efficiency staff of the Committee on Finance, a letter was sent out under date of January 4, 1918, addressed to all the heads of departments using such tires, requesting them to submit estimates of their needs in this line for the current fiscal year.

All departments responded to this request, but the reply from the Department of Public Works stated that bids had already been advertised for in that department and that these were to be opened on January 25th.

Under Section 2517 of The Chicago Code of 1911, as amended (Council Journal, March 9, 1914, p. 4348), it is the duty of the department heads to submit such estimates to the business agent upon his request. Hence, it would be only a strict compliance with the ordinances now in force, in case the mayor directed that these estimates be submitted to the business agent.

The reports presented in response to said request indicate that about \$88,000 worth of these tires will be required during the year. It is believed that a substantial saving, amounting to something like \$15,000, could be effected if the specifications are standardized and the whole let as one contract. These estimates are based on figures which were obtained in December. The business agent has already prepared specifications, and would be able to advertise and let a contract at once if the necessary authority were granted to him.

The question presented is whether it is within your power to direct the heads of departments to order the required tires through the business agent.

We have no doubt as to the authority of the mayor to direct the heads of the departments to wait, before making contracts, until appropriate action can be taken by the City Council. This power is vested in the mayor not only by virtue of his general authority over all executive officers, but also by the special provisions of the Code which require all

contracts to be approved by the mayor. It is not to be assumed that the approval of the mayor is a perfunctory matter, but rather that this provision of the law contemplates that he shall have the power of controlling the action of the heads of departments in the matter of making contracts.

The right to issue an order directing that such tires be purchased by a contract made by the business agent is a different matter. We believe it will be necessary before that is done to have Council action. The ordinances limit the powers of the business agent as to the amount for which he can contract on the one hand, and the appropriation bill places the power of ordering supplies in the heads of departments on the other, so that it is doubtful whether anything short of an ordinance will make it proper for the business agent to make such a contract as will be necessary. It is true that the City Council has sometimes authorized contracts exceeding \$2,500 for supplies to be made by the business agent by the passage of an order, but inasmuch as it did not involve the question of the authority of the head of a department no objection has been raised. In the present instance we deem it advisable that the necessary authority be granted by an ordinance which expressly places the power in the business agent's hands and repeals such parts of other ordinances as conflict therewith. We have prepared, and submit for your consideration, draft of an ordinance which we believe will accomplish this.

In the meanwhile it is within your power, as chief executive officer of the city, to direct the business agent to advertise for bids, and also to direct the heads of other departments to refrain from making contracts for tires and to hold orders for same until either the necessary authority is secured by Council action or refused by that body.

The business of making contracts is an executive function over which the mayor may exercise control at all times. It is an administrative matter for which he is responsible even though the duties in relation thereto are placed by ordinance in the hands of the department heads.

In the mixed condition which is created by reason of the conflict of ordinances now in force, it is peculiarly within

the province of the mayor to so direct affairs that there shall be no clash of authority between department heads and so that there shall be no waste on account of an overlapping of powers created by ordinance. The questions that have arisen in connection with the placing of the contracts for tires have brought this matter squarely before you, and we believe the conditions warrant the exercise of administrative authority on your part.

In going over the situation with the auditor and others it was ascertained that such tires and other supplies are now secured to a large extent through the construction division of the Bureau of Engineering, which has a capital account under which it is authorized to purchase supplies for the other departments. It seems that by virtue of the wording of the appropriation for this capital account such supplies have been purchased and sold to the other departments after an addition of at least 15 per cent and sometimes much more for overhead expense was added. There was apparently no further authority for this than the appropriation made therefor, until the passage of an ordinance on November 19, 1917 (Council Journal, p. 1507), which expressly put this power into the hands of the commissioner of public works. We do not consider it necessary to discuss at this time how far this ordinance conflicts with the ordinances defining the duties of the business agent, but we deem it proper to call attention to the fact that the ordinance, by executive construction, operates to the disadvantage of the general corporate fund and to the benefit of the water fund. It does not in terms say that this capital account shall be set up from the water fund, but simply provides for giving the commissioner of public works the power "upon proper provision being made therefor." It incidentally requires quarterly reports from the municipal shops and the municipal storehouse, but even this hardly warrants the setting up of a capital account from the water fund which benefits through overhead charges while the departments drawing on it for supplies must pay an advanced price.

As a concrete illustration of how this works out we will point to an instance given to us by the business agent concern-

ing a requisition recently made by the bridge division for some "STOP" signs for use at the bridges. The bridge division must draw on the general corporate fund for the payment of bills incurred by it. The requisition was made on the construction division of the Bureau of Engineering. The signs were made in the municipal shops, and an overhead charge was added to cost there and the price of same fixed at \$75 each. The overhead charge was for the benefit of the water fund. The signs were sent to the municipal store, and \$15 for overhead charge was added there, making the price \$90, and again the overhead charge went to the water fund. Then the signs were sent to the construction division, and another overhead charge of \$13.50, which also went to the water fund, was added. Thus, the corporate fund was charged \$103.50, for each sign, when the shops turned them out originally at \$75, and included in that price a reasonable overhead charge.

We are told that many cases of this kind have occurred. We have sufficiently verified the statements concerning same to say that we are satisfied that the general corporate fund has suffered materially in this way. We do not believe we are dragging in something which is not affected by the proposition before us in calling your attention to this state of affairs, because the question of overhead charges on same is one that should be considered. It is also proper to consider the likelihood of waste resulting from carrying these tires back and forth from the municipal shops, and upon a consideration of these and other matters to determine whether under all the circumstances it would not be better to have the contract placed by the business agent. If you come to the conclusion that this is advisable, a recommendation to the City Council in regard to the ordinance we submit herewith would be the proper course to pursue.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Status of Term of Commissioner of Public Welfare.

January 24, 1918.

HONORABLE JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your communication of the 17th instant, in which you ask to be advised as to the present "status of the term of the commissioner of public welfare." You ask when the term expires.

On February 9, 1914 (Council Proceedings, p. 4053), Alderman Merriam presented an ordinance establishing a Department of Public Welfare, which was referred to the Committee on Judiciary.

On March 23, 1914 (Council Proceedings, p. 4588), an ordinance was passed establishing the Department of Public Welfare.

This ordinance, so far as material to the present inquiry, contained the following provisions:

1st. It establishes: "An executive department of the City of Chicago which shall be known as the Department of Public Welfare, and which shall include a commissioner of public welfare and such assistants and employes as the City Council from time to time may by ordinance provide."

2nd. It created the office of commissioner of public welfare, and provided that such commissioner "shall be appointed by the mayor, by and with the advice and consent of the City Council. He shall have charge of the general management and control of all matters and activities pertaining to said department, and shall appoint, according to law, all subordinate officers, assistants and other employes."

3rd. The ordinance further created "A bureau of the Department of Public Welfare, which shall be known as the Bureau of Employment, and which shall operate" the various municipal lodging houses, and perform certain duties in collecting information. And it provided further, that "the chief officer of said Bureau of Employment shall be known as the superintendent of the Bureau of Employment."

4th. The ordinance also created a "Bureau of the Department of Public Welfare, which shall be known as the Bureau of Social Surveys," and prescribed the duties of such bureau, and provided: "The chief officer of said bureau shall be known as the superintendent of the Bureau of Social Surveys."

On March 30, 1914 (Council Proceedings, p. 4691), there was appropriated by the City Council an item, among others, as follows:

"DEPARTMENT OF PUBLIC WELFARE.

Commissioner of Public Welfare—nine months at the rate of \$5,000 per annum.....\$3,750."

The annual appropriation bill passed January 18, 1915 (Council Proceedings, p. 2937), contained, among others, an item as follows:

"DEPARTMENT OF PUBLIC WELFARE.

General Office.

Salaries and Wages.

Commissioner of public welfare.....\$5,000."

On May 17, 1915 (Council Proceedings, p. 170), the mayor appointed Mrs. Louise Osborne Rowe to be commissioner of public welfare and the City Council confirmed the appointment. Thereupon she duly qualified as such commissioner of public welfare, and has since been and is filling and performing the duties of the office in the space provided by the City Council.

The annual appropriation bill passed March 6, 1916 (Council Proceedings, p. 3586), contained, among others, an item as follows:

"DEPARTMENT OF PUBLIC WELFARE.

General office and Social Surveys salaries and wages.

* * * * *

Commissioner of public welfare.....\$5,000."

The City Council in the annual appropriation bill for 1917 made no appropriation for the commissioner of public welfare or for the Department of Public Welfare.

The question whether or not the failure to make an appropriation in the annual appropriation bill for the salary of the commissioner of public welfare abolished her office and deprived her of her right to salary is pertinent to your inquiry.

The ordinance of March 23, 1914, by which this department was established, did not fix the annual salary of the commissioner of public welfare, but as before pointed out, on March 30, 1914, and on January 18, 1915, prior to the appointment of Mrs. Rowe as commissioner of public welfare, the City Council fixed the salary of the commissioner of public welfare at \$5,000 per annum; and after her appointment on March 6, 1916, the City Council again recognized that such was her annual salary.

We think, therefore, that it must be accepted as a fact that the salary of the commissioner of public welfare at the time Mrs. Rowe was appointed and entered upon the discharge of her duties was \$5,000 per annum.

The ordinance of March 23, 1914, does not prescribe the term of the office of the commissioner of public welfare, but it creates the office and provides that such commissioner, "shall be appointed by the mayor, by and with the advice and consent of the City Council."

Section 1641 of The Chicago Code of 1911 (p. 565) reads as follows:

"All officers appointed by the mayor, by and with the advice and consent of the City Council, whose term of office is not otherwise expressly provided for by law, shall be appointed on the first Monday in May, next succeeding the general election for mayor, or as soon thereafter as is practicable, and shall hold their respective offices *during a term of two years and until their successors are appointed and qualified.*"

Therefore, it seems to be clear that the term of office of Mrs. Rowe, as commissioner of public welfare, is from May 17, 1915, to May 17, 1917, *and until her successor is appointed and qualified.*

State ex rel. Carson v. Harrison, 16 N. E. 384;

People v. Baird, 82 Ill. App. 571, 587, 588.

We understand that it has been suggested that Mrs. Rowe is not entitled to salary for the year 1917 because the Council made no appropriation for such salary in that year, and Section 1646 of The Chicago Code of 1911 is referred to in support of that position. Said section reads as follows:

“The salaries or compensation of all officers, clerks and employes of the city, shall be determined and fixed by the City Council in the annual appropriation bill.”

But the question arises whether that section is valid as applied to such officers as the commissioner of public welfare.

Section 11 of Article IX of the Constitution of 1870, reads in part as follows:

“The fees, salary or compensation of no municipal officer who is elected or *appointed for a definite term of office* shall be increased or diminished during such term.”

Section 15 of Article VI, of Chapter 24 of the Statutes (Hurd's Revised Statutes, 1915-16, p. 313), reads in part as follows:

“All other officers (*i. e.*, other than the mayor and aldermen) may receive a salary, fees or other compensation to be fixed by ordinance, and after the same has been once fixed such fees or compensation shall not be increased or diminished, to take effect during the term for which any such officer was elected or appointed.”

From the foregoing it is apparent, as it seems to us, that, during the term of her office, Mrs. Rowe is entitled to her salary.

July 30, 1917, we wrote you as follows:

“IN RE APPROPRIATIONS IN THE 1917 APPROPRIATION BILL FOR THE BUREAU OF EMPLOYMENT, GARDENS AND WOODYARD AND MUNICIPAL LODGING HOUSE.

July 30, 1917.

HON. JOHN A. RICHERT, Chairman, Committee on Finance, Chicago, Illinois.

Dear Sir:

Assuming that the situation is as we understand it to be, namely, that said bureau was created and brought into existence under the ordinance of March 23, 1914, establishing a Department of Public Welfare (Council Journal, pages 4588-9), that an attempt was made on or about January 31, 1917, to transfer said bureau from the Department of Public Welfare to the Department of Health, but that such attempt was abortive, it is our opinion that such bureau continued and still continues in the Department of Public Welfare, subject to the direction and control of the commissioner of public welfare, as provided in said ordinance of March 23, 1914.

As we understand, the City Council in the 1917 appropriation bill intended to make specific appropriations for this bureau, but that such appropriations were made under a misapprehension that the bureau had been transferred to the Department of Health.

In this situation it seems to us that the intention of the City Council would be carried out if the appropriations for this bureau are treated as having been made specifically for the bureau, regardless of whether it was located in the Department of Public Welfare or in the Department of Health, and that, inasmuch as a matter of law it continues to be in the Department of Public Welfare, the appropriations so made may, without violating any law, be paid for the purposes intended by the Council under the Department of Public Welfare instead of under the Department of Health.

However, as a practical proposition, in order to obviate any question, it might be well to have the pay-rolls and vouchers against these appropriations approved both by the commissioner of health and the commissioner of public welfare.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
CHESTER E. CLEVELAND,
Acting Corporation Counsel."

On September 25, 1917, we again wrote to you concerning this matter. (Here follows letter of that date signed by Chester E. Cleveland, which appears in this volume of opinions.)

Summed up the situation seems to be:

The City Council, after full deliberation, in 1914 established the Department of Public Welfare. Then, in 1917, it undertook to leave such department still in existence but to deprive the head of the department of her salary and to transfer temporarily certain activities from the Department of Public Welfare to the Department of Health. It being found that such transfer was unauthorized by law, such activities were re-transferred to the Department of Public Welfare, which continued its work pursuant to the ordinance by which it was established, except that the attempt was persisted in to deprive the head of the department of her

salary. But the court has held that the head of the department is entitled to her salary notwithstanding the failure of the Council to make an appropriation therefor.

Perhaps it will not be out of place, in view of certain statements in the press, for us to add that, as we are advised, the commissioner of public welfare has not received any compensation from the Mayor's Contingent Fund.

Very truly yours,

GEO. A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Powers of Art Commission.

January 24, 1918.

THE ART COMMISSION OF THE CITY OF CHICAGO, Art Institute,
Chicago, Illinois.

Gentlemen:

We are in receipt of your communication of January 7, 1918, requesting us to furnish you with a list of all of the public bodies affected by the law governing the powers of the Art Commission, and also advising us that there are now located in Lincoln Park two works which, according to the records, have not been approved by the Art Commission, and requesting us to render you an opinion in regard to the power and authority of the Art Commission to deal with such cases.

In reply, we beg to advise you that by virtue of an act of the General Assembly of the State of Illinois in force and effect July 1, 1915, the City Council is authorized, whenever it shall deem it advisable, to provide, by ordinance, for the creation of a commission to be known as the Art Commission, and under this authority the City Council passed an ordinance November 1, 1915, "Creating the Art Commission of the City of Chicago." Section 122 of the ordinance dealing with the power of the commission provides as follows:

“The said commission shall proceed and act in accordance with the provisions of an act of the General Assembly entitled, ‘An Act to provide for the creation of art commissions in cities and to define their powers.’ ”

Section 6 of the act of the General Assembly authorizing the creation of art commissions provides for the duties and powers of the said commission. After carefully reading the section, we desire to advise you that the power of the Art Commission of the City of Chicago in supervising and regulating art is limited in its operation to public streets, alleys, avenues, squares, commons, boulevards, parks, grounds used for schools or other public purposes, municipal buildings, school buildings or other public buildings or public places under the control of the City of Chicago or some department or officer thereof. Parks, boulevards, or other public places under the control or jurisdiction of a Board of Commissioners appointed by the governor or other state agency are not subject to regulation by the Art Commission of the City of Chicago.

You mention in your communication that there are now two works of art in Lincoln Park which according to your records have not been approved by the Art Commission. We beg to advise you that Lincoln Park is controlled by a Board of Park Commissioners appointed by the governor and that the power of the Art Commission of the City of Chicago to regulate art is limited by the statute to parks under the control of the City of Chicago. What we have said in regard to Lincoln Park applies equally to the parks controlled by the Board of West Park Commissioners and to the parks controlled by the South Park Commissioners.

We are forwarding to you, under separate cover, the Annual Report of the City Council on Parks, Playgrounds and Beaches, which contains a directory of parks and squares under the jurisdiction of the City of Chicago. All of these are under the control of the Commissioner of Public Works of the City of Chicago, and the jurisdiction of the Art Commission of the City of Chicago extends to the same.

If your commission is desirous of any further information kindly advise us and we will be pleased to comply.

Yours very truly,

J. W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Price of Coal.

January 25, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We have your letter of January 18, 1918, stating that the contractors furnishing coal to the City of Chicago have made claim for an additional 45 cents per ton under the clause of their contract referring to increase in miners' wages; this claim being based on the so-called President's Order of October 27, 1917, which order provides as follows:

"ORDER.

THE WHITE HOUSE,

Washington, D. C., 27 October, 1917.

"The scale of prices prescribed 21 August, 1917, by the President of the United States for bituminous coal at the mine, as adjusted and modified, by order of the United States Fuel Administrator, to meet exceptional conditions in certain localities, is hereby amended by adding the sum of 45 cents to each of the prices so prescribed or so adjusted and modified, subject, however, to the following express exceptions:

"(1) This increase in prices shall not apply to any coal sold at the mine under an existing contract containing a provision for an increase in the price of coal thereunder in case of an increase in wages paid to miners.

"(2) This increase in prices shall not apply in any district in which the operators and miners fail to agree upon a penalty provision, satisfactory to the Fuel Administrator, for the automatic collection of fines in the spirit of the agreement entered into between the operators and miners at Washington, October 6, 1917.

"This order shall become effective at 7 a. m. on October 29, 1917.

(Signed) WOODROW WILSON."

and stating further that the contractors have already been allowed an increase of 35 cents per ton under the April or Washington agreement between the miners and operators, and asking our advice as to whether or not this claim should be allowed under the terms of the contract and so-called President's order.

The contract, so far as we have been advised, contains only the following provisions regarding the matter of an increase in the price of coal:

"Should the Miner's Wage Scale or Freight rate during duration of contract or extension of contract be increased or decreased above or below the scale in force on date of opening of bids, there will be added to or deducted from the price bid, one and one-half ($1\frac{1}{2}$) times the number of cents increase or decrease per ton corresponding to change in Miner's Wage Scale, and the number of cents per ton increase or decrease in Freight Rate.

"That such correction due to change in the Miner's Wage Scale or change in Freight Rate will be applied only to such coal shipped from the mines after the change in the Scale or Freight Rate has been made.

"That the contractor will furnish such information as will positively prove any change in Miner's Wage Scale or Freight Rate after the day of opening bids."

We have had occasion to pass upon this matter in substance in December, 1916, when we advised the Honorable Wm. R. Moorhouse, commissioner of public works, in an opinion dated Dec. 6, that the provisions in the contract relating to an increase or decrease in the contract price were not repugnant to law and were valid and enforceable, and advised him that the question as to whether or not there had been an increase or decrease in the miners' wages was one of fact to be determined to the satisfaction of the commissioner of public works.

We know of no reason why we should change our opinion as expressed in the letter of December 6, 1916, and believe it is unnecessary to consider the effect of the President's order of October 27, 1917, in view of the fact that we hold that

the contractor is entitled to the benefit of the provisions of the contract providing for an increase in the contract price of $1\frac{1}{2}$ times the increase in miners' wages, and that the city would be entitled to the benefit of that part of the contract providing for a decrease in the contract price in the event of a decrease in the wages.

Whether or not an additional 45 cents should be allowed would depend on whether or not there had been an increase of at least 30 cents in the miners' wages since the so-called April or Washington agreement between the miners and operators. As stated before, that fact must be determined by you as it is not a question of law.

Yours very truly,

F. S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Increase of Corporate Revenue Without Change of Tax Rate.

January 26, 1918.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We are in receipt of your letter in which you ask for an opinion on the subject of issuing bonds for the purpose of constructing school buildings so as to make possible an increase of the tax rate of the city for corporate purposes, without adding to the total rate, in order that the city's financial situation may be relieved but no immediate additional burden will be imposed on the taxpayers.

We are of the opinion that the plan you propose is entirely feasible, if the necessary legislation is secured and the co-operation of the Board of Education can be obtained.

In your letter you have taken the chart prepared by the city comptroller showing how the taxes collected from the taxpayers of Cook County are distributed as the basis of your figures. This chart was prepared by using the 1915 tax rate.

From this chart it appears that out of each dollar collected about $21\frac{1}{4}$ cents goes to the school educational fund and $10\frac{1}{2}$ cents is set aside for new school buildings. You point out that the educational fund is inadequate, that the general corporate fund of the city is admittedly about \$5,000,000 short of actual needs, and that if the building of new school houses could be taken care of for the present by twenty year bonds, as other permanent public improvements are financed, it would be possible to increase the rate for educational purposes so that about 23 cents out of each dollar of taxation could be applied thereto, a sinking fund of about \$750,000 annually could be provided for, and there would still be enough left to give the city the much needed revenue without increasing the total rate.

The tax rate for 1917 accentuates the points brought out by the comptroller in his chart, and makes the plan you propose even more desirable from the standpoint that it is urged, because the proportion of the dollar that goes to the general corporate fund and to the educational fund under the 1917 tax rate is even smaller than is shown on the chart.

The school building tax for the year 1917 is 64 cents on each \$100 of assessed valuation. For practical purposes it may be said that each cent of the rate produces \$100,000 in revenue. Hence, the school building tax of 1917 will produce about \$6,400,000 which is to be used for new buildings.

A rate of 7 cents would probably be sufficient to establish a sinking fund that would take care of the bonds to be issued, thereby leaving 57 cents available for city corporate and school educational purposes without an increase of the total rate. In other words, the city rate could be increased from \$1.10 to \$1.60, and the school educational rate could be increased from \$1.20 to \$1.27.

You ask particularly whether such a change as the above would result in reducing the power of the city to issue bonds, on account of the constitutional debt limitation, also whether the construction of buildings for educational purposes would thereby be retarded.

In our opinion, neither of these things would result.

Prior to the enactment of the new school law the Board of Education was a branch of the city government, and such a plan would have affected the city's borrowing power and the School Board could not have issued bonds without a referendum. But this has been changed.

By Section 132 of the School Act, as amended at the last session of the General Assembly, the Board of Education is given express power "to issue bonds for the purpose of building, furnishing and repairing school houses and school administration buildings and for purchasing sites for the same, and to provide for the payment of said bonds." The power is granted in substantially the same language as is used in the statutes for granting like power to the City Council, The Sanitary District of Chicago and other municipal corporations. By the same act the Board of Education is created a body corporate and politic. Consequently, the power vested in the School Board must be construed in the same way as the power vested in such other municipal corporations.

The territory within the jurisdiction of the Board of Education is a "school district" within the meaning of that term in Section 12 of Article IX of the Constitution. By that section such a school district is defined as a municipal corporation. The prohibition as to indebtedness reads as follows:

"No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness."

This prohibition applies to each of such municipal corporations and not to the aggregate, whether they overlap or are co-extensive with each other or not.

Our Supreme Court said, in *Wilson v. Bd. of Tr. of Sanitary District*, 133 Ill. 443-476: "It would be difficult to employ language making it plainer that the prohibition is on

each corporation singly, and not upon two or more in the aggregate.”

The mere fact that the territory of this school district is co-extensive with the city does not alter the status thus created. The Sanitary District, until very recently, covered practically the same territory as the city. Yet its separate bonding power was upheld in the cases above cited. In like manner, the park districts are all within the city limits, yet they have power to issue bonds without affecting the borrowing power of the city.

The building of new school houses need not be retarded on account of issuance of bonds, because there is no provision of the law which requires the Board of Education to submit the question of issuing bonds to a referendum. They can be issued by the passage of a proper resolution without delay. The act providing for a referendum is limited to cities, villages, and incorporated towns. The Board of Education will, of course, have the deciding voice in determining whether such a program will be entered upon, since that body may or may not issue bonds as it sees fit. Hence, the attitude of the board in regard to the proposed plan must be taken into account.

It will thus be seen that if the Legislature will amend the present laws so as to permit an increased tax rate for city corporate and school educational purposes it will be possible, through the co-operation of the Board of Education, to meet the situation that confronts the city without reducing the borrowing power of the city, without hindering the construction of new schools, and without adding to the burdens of the taxpayers for a number of years.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Revenue Stamps on Indemnity Bonds Running to the City
of Chicago.**

January 30, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of January 25th, asking to be advised if revenue stamps are required on indemnity bonds running to the City of Chicago. In answer thereto we submit the following letter of D. C. Roper, commissioner of internal revenue, direct to collectors of internal revenue:

“(T. D. 2624)

War Revenue Act—Bonds.

Bonds given by officials of a State, township, county or village for the faithful performance of duties, not subject to the stamp tax.

TREASURY DEPARTMENT

Office of Commissioner of Internal Revenue,
Washington, D. C.,

December 14, 1917.

TO COLLECTORS OF INTERNAL REVENUE:

You are hereby informed that bonds given by officials of a state, township, county or village, for the faithful performance of duties, and any bonds given to the same political subdivisions covering contracts for governmental purposes or the protection of the state, township, county, village or municipality, in any respect, are held to be free from Federal taxation on the broad ground that the sovereign states and subdivisions thereof are constitutionally free from taxation by the federal government.

You will note that this ruling does not apply to bonds otherwise taxable given to the federal government for any purpose.

DANIEL C. ROPER,
Commissioner.

O. K.

JULIUS F. SMIETANKA,
Collector.

Per

D. J. MAHANY, *Chief Deputy.*”

From the foregoing ruling of the Treasury Department, we are of the opinion that no revenue stamps are required on indemnity bonds running to the City of Chicago.

Very truly yours,

EDWARD H. WRIGHT,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Employees of Election Commissioners' Office.

February 4, 1918.

MR. L. E. GOSSELIN, JR., Auditor.

Dear Sir:

We are in receipt of your favor of February 2, 1918, requesting us to advise you whether or not the comptroller should make any distinction between employes in the election commissioners' office and employes of other departments of the city relative to vacations and sick leaves, and informing us that each year the City Council passes an order granting vacations and sick leaves to city employes.

In reply, we beg to advise you that the management and conduct of the office of the election commissioners of the City of Chicago and the employes thereof is exclusively within the control of the Board of Election Commissioners of the City of Chicago.

This board has been created by an act of the General Assembly of the State of Illinois, and under the act the commissioners are appointed by the judge of the County Court of Cook County.

Section 4949 of Chapter 46, page 2681, Illinois Statutes Annotated, provides that the Board of Election Commissioners shall have the right to employ a chief clerk who shall have charge of the office of said board, and such additional assistants may be employed by said board from time to time as may be necessary with the consent and approval previously entered of record by the judge of the County Court of Cook County, or which may afterwards be approved by such court.

Section 5056 of Article VII of Chapter 46 provides that all expenses incurred by such a Board of Election Commissioners shall be paid by such city. Such salaries and expenditures are to be audited by the county judge and such salaries shall be paid by the county treasurer upon the warrant of the county judge of any money in the county treasury not otherwise appropriated, and such expenditures shall be paid by the city treasurer upon the warrant of the county judge out of any money in the city treasury not otherwise appropriated. The statute further provides that it shall be the duty of the governing authority of such city to make provision for the prompt payment of such salaries and expenditures as the case may be.

In the case of *Wetherell v. Devine*, 116 Ill., p. 631, the Supreme Court held the Board of Election Commissioners created by the law of 1885 (the law under which the Board of Election Commissioners of the City of Chicago has been created) are corporate authorities within the meaning of the Constitution, and that they possess the power to incur debts for necessary expenses on behalf of the city, and that such expenses are for corporate purposes.

It is, therefore, the duty of the City Council to provide by appropriation for the payment of expenses incurred by the Board of Election Commissioners, and it is the duty of the comptroller to pay out of such money so appropriated for the Board of Election Commissioners such vouchers as shall be presented to him properly audited by the officials in charge of the Board of Election Commissioners' office. If the comptroller is unable to pay such vouchers on account of the failure of the City Council to provide an appropriation for the same, the Board of Election Commissioners or any employe thereof or other person entitled to receive pay or compensation or other indebtedness incurred by the Board of Election Commissioners of the City of Chicago, may file a mandamus suit to compel the City Council to make an appropriation for the payment of such sum. The City Council has no power or authority to regulate the hours of employment of the employes of the election commissioners' office, or to regu-

late their vacations or sick leaves. The only body authorized to regulate the vacation periods and sick leave periods of the employes of the election commissioners' office is the Board of Election Commissioners. The comptroller has no authority to deduct any money from the wages of any employe of the election commissioners' office.

When the comptroller receives a voucher for the payment of the salary of an employe of the election commissioners' office the amount of money stated in said voucher is the amount that the persons having charge and control of said office have determined is due such employe, and the comptroller has no discretion in the premises. His duty is to pay the voucher if he has in his possession sufficient funds appropriated by the City Council. If the Council has failed to provide by appropriation sufficient funds for such purpose, it is the duty of the comptroller to so notify at once the Board of Election Commissioners of the city, when they will be at liberty, if they so desire, to take such action as they may deem advisable to compel the Council to provide for the payment of same.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Departments Excluded from Vacation and Sick Leave Provisions.

February 5, 1918.

MR. L. E. GOSSELIN, JR., Auditor.

Dear Sir:

We beg to acknowledge receipt of your favor of February 2, requesting us to advise you what departments of the city government are exempt from the provisions of the order that has been passed annually for the past five or six years by the City Council providing for vacation and sick leave periods.

From an investigation it appears that the last order of this character was passed by the City Council on February 5, 1917, and appears on pages 3247 and 3248 of the Journal of the Proceedings of the City Council of said date. The first paragraph of the said order provides as follows:

“ORDERED, That the executives of the various departments of the City of Chicago arrange and designate vacation periods and periods for sick leave for the current year by providing vacations of two (2) weeks, with pay, in accordance with the provisions of the appropriation bill, for all employees except those in the skilled labor and labor service classes who are employed on a per diem basis, who have been engaged in the city's service for a period of at least one (1) year prior to such vacation. Such vacation, if thought advisable by the respective department heads, may be divided into two periods; and be it further”

and the last paragraph of the said order provides as follows:

“ORDERED, That there shall be exempt from the effect and operation of this order, the executives of Board of Education, Public Library, Municipal Tuberculosis Sanitarium, Law Department, and all active members of the Department of Police and the Fire Department.”

In your communication you request us to advise you as to what is meant by the term “Law Department” as used in the paragraph we have quoted above, and whether or not it includes—in addition to the corporation counsel's office, the city attorney and prosecuting attorney—the clerks, bailiffs and probation officers of the Municipal Court, and, pending the passage of a similar order for the year 1918, if the comptroller could legally pay for lost time of any of the above employees.

In reply, we beg to advise you that the charter of the City of Chicago designates the corporation counsel as the head of the Law Department of the city, and, under the law, both the city attorney and the prosecuting attorney are assistant corporation counsel designated by the corporation counsel to act as city attorney and prosecuting attorney, and all the employees in either one of these offices are employees of the Law Department of the city and must be included within the meaning of the section exempting the Law De-

partment of the city from the operation of the order in question.

In regard to the clerks, bailiffs and probation officers of the Municipal Court, we beg to advise you that the City Council of the City of Chicago has no power or authority to regulate their hours of employment, sick leaves or vacation periods. While it is true that The Municipal Court of Chicago may be construed as a branch of the city government, it does not necessarily follow that the City Council has the power to control and regulate the same. The Municipal Court of Chicago was created by an act of the General Assembly of the State of Illinois, and the judges of the said court are authorized to designate the number of employes necessary for the chief bailiff and the chief clerk to employ in order to carry on the business of the court. The judges also have the power, and it is their duty, under the law, to fix the salaries of such employes. They also have the power to regulate the hours of employment, and the City Council has no authority or power to interfere with the same. The chief clerk and the chief bailiff of the Municipal Court are responsible to the judges of the said court for the proper conduct of their offices and for the preparation of any pay roll for employes in their respective offices. It is their duty to determine what amount of money each employe is entitled to receive for the respective periods of employment from pay day to pay day, and when such rolls are approved by them it is the duty of the comptroller to pay the same.

If the judges of the Municipal Court desire to make some arrangements to grant the employes of the chief clerk and chief bailiff of the said court vacation or sick leave periods, they have the power to do so. The City Council has not the power, and the comptroller should not include the employes of the Municipal Court among those within the purview of the annual vacation and sick leave order as passed by the City Council.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Payment of Bond that is Inaccessible.

February 5, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication and attached correspondence concerning payment of certain matured City of Chicago Water Works Bonds, which it is claimed are now in safety deposit vault in Berlin.

From the correspondence at hand we understand the following to be the facts:

That Mr. Clarence E. Metcalfe has recently returned to the United States from Berlin, Germany, where he was engaged in the importation of American horses for the German market for eighteen years; that while a resident of Berlin, Germany, on or about October 23, 1916, Mr. Clarence E. Metcalfe purchased from the American Express Company of Berlin, Germany, one \$1,000 City of Chicago Water Works 4% gold bond, No. 356, due July 1, 1915; that Mr. Metcalfe has the receipt of the American Express Company of Berlin, Germany, for the purchase of said bond; that after he received said bond he deposited it in his safety deposit box in the Deutsche Bank of Berlin, Germany; that at the time Mr. Clarence E. Metcalfe left Berlin, Germany, on October 2, 1917, the German government would not permit him to take the bond, but that he was compelled to leave it in his safety deposit box in the Deutsche Bank of Berlin, Germany.

We understand your inquiry to be, whether or not you are authorized to make payment of the sums due on the bond, No. 356, on a proper showing and proof of the facts hereinbefore alleged and the execution of a surety bond to you, to save you harmless from any future claim on this bond.

The law of bonds and notes in this state is governed by the Negotiable Instrument Act, being Chapter 98 of Hurd's Revised Statutes of 1915-1916. The only exception to the rule that presentation of the bonds is necessary before payment can be had, is contained in Section 14 of said act, being known as Section 14 of Chapter 98, Hurd's Revised Statutes, 1915-1916, page 1780, and said section provides as follows:

“LOST INSTRUMENTS.) 14. In any action founded upon any note, bond, bill, or other instrument in writing, or in which the same, if produced, might be allowed as a set-off in defense, if it shall appear that such instrument was lost while belonging to the party claiming the amount due thereon, to entitle him to recover upon or set-off the same, he may, in the discretion of the court, be required to execute a bond to the adverse party in a penalty at least double the amount of such note, bill or instrument, with sufficient security, to be approved by the court in which the action is pending, conditioned to indemnify the adverse party, his heirs, executors and administrators, against all claims by any other person on account of such instrument, and against all cost and expenses by reason thereof.”

It is our opinion that the statement of facts hereinbefore set forth, would not warrant you in making payment of this bond, except on the presentation of the bond by the lawful owner. We would therefore advise that you note the claim of Mr. Metcalfe upon your records, so that if the bond is presented, payment shall not be made until the question of title is fully settled.

Yours very truly,
 GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Care of Disabled Policemen and Firemen in Municipal Tuberculosis Sanitarium.

February 7, 1918.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In answer to your verbal request to be advised as to whether city policemen and city firemen, who become sick or disabled, can in any and all instances be sent to the Municipal Tuberculosis Sanitarium for medical care and treatment, we would say that the act under which the Municipal Tuber-

culosis Sanitarium was established provides in part as follows:

“That the city council of cities and boards of trustees in villages of this state shall have the power, in the manner hereinafter provided, to establish and maintain a public sanitarium and branches, dispensaries and other auxiliary institutions connected with same within or without the limits of such cities and villages, for the use and benefit of the inhabitants of such city or village *for treatment and care of persons afflicted with tuberculosis.* * * *

“All moneys recieved for such sanitarium shall be deposited in the treasury of said village or city to the credit of the tuberculosis sanitarium fund, and *shall not be used for any other purpose* and shall be drawn upon by the proper officers of said city or village upon the properly authenticated vouchers of the Sanitarium Board. * * *

“Every sanitarium established under this act shall be free for the benefit of the inhabitants of such city or village *who may be afflicted with tuberculosis*, and they shall be entitled to occupany, nursing, care, medicines and attendance according to the rules and regulations prescribed by said board.”

From the foregoing you can readily see that such sanitarium was created solely *for the treatment and care of persons afflicted with tuberculosis*, and the specific language of the last mentioned provision would seem to clearly negative the right of any person not afflicted with tuberculosis to secure any of the benefits therein mentioned.

Inasmuch as we are unable to find any legal authority for holding that an institution of the character and purpose in question can be used by the municipal government for another and different purpose for the benefit of certain employes of such municipality, we must conclude that only such city policemen and city firemen as are afflicted with tuberculosis can be sent to the Municipal Tuberculosis Sanitarium; and then only for such care and treatment as comes within the purpose for which such sanitarium was established.

Yours very truly,

H. C. FOSTER,

Approved: Assistant Corporation Counsel.

SAMUEL A. ETTELSON,
Corporation Counsel.

Pension Fund Moneys.

February 8, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your favor of February 4, 1918, in which you advise us that it has been your custom to turn over monthly to the Police Pension Fund all moneys collected from police details and one-half the amount collected from bar permits, and informing us that many provisions of the Pension Law have been changed, and requesting us to advise you if payment of these moneys over to the Police Pension Fund is legal and in accordance with the provisions of the present Police Pension Fund Act.

In reply, we beg to advise you that Section 9 of the Police Pension Fund Act as amended and in force and effect July 1, 1917, provides, in part, as follows:

“Said Pension Fund shall consist of amounts of two and one-half ($2\frac{1}{2}\%$) per cent, retained or deducted by the comptroller of any such city from the salary or wages payable monthly to each policeman and such other sums as are hereinafter referred to. * * *”

Section 10 of the Police Pension Fund Act in force and effect July 1, 1915, has not been changed or amended in any way, and contains the same provisions now that it did prior to the amending of Sections 3, 4, 5, 6, 7 and 9 of the said act. So much of Section 10 as is material for the purpose of answering your inquiry is as follows:

“Second: All rewards, moneys, gifts, fees or emoluments that may be paid or given for, or on account of, extraordinary service by said police force or by any policeman, except when allowed to be retained by said policeman, or given to endow a medal or other competitive reward, shall be paid into said Pension Fund. The said board may take, by gift, grant, devise or bequest, any moneys, real estate, personal property, right of property or other valuable thing.

“Third: All moneys paid for special detail of policemen, fines imposed upon policemen of such city for violation of the rules and regulations of the Police De-

partment, and moneys received from all sales of unclaimed or stolen property."

From a reading of the above provisions of the statute you will observe that the Police Pension Fund is entitled to and should receive all moneys collected from special police details, and among such receipts is one-half of the fee charged for special bar permits, in accordance with the provisions of Section 8 of an ordinance passed April 8, 1915, authorizing the issuance of special bar permits, all fines imposed upon policemen for violations of the rules and regulations of the department, as well as all rewards, moneys, gifts, fees or emoluments that may be paid or given for or on account of extraordinary services by said police force or by any policeman, except when such reward may be retained by individual policemen in accordance with the rules of the Police Department.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Hours of Employment.

February 9, 1918.

HON. JOHN DILL ROBERTSON, M. D., Commissioner of Health.
Dear Sir:

We are in receipt of your favor of January 30, in which you advise us that some questions have arisen in your department as to the interpretation of the ordinance passed by the City Council on December 31, 1917, regulating the hours of employment of city employes, and in which you request us for an interpretation of the ordinance and request us to answer the following interrogatories:

"1. Does the ordinance establishing the hours that the offices shall be open relate to work outside of the City Hall, such as the inspection service, the school nursing service, medical inspection in the schools, etc.?"

We are assuming that these office hours do not apply to the various establishments of the city maintained outside of the City Hall, such as the bath houses, hospitals, etc.

"2. Are the eight hours required for a day's service by city employes inclusive or exclusive of the time necessary and allowed to eat lunch?

This question is of special interest to our employes because our regulations heretofore have always required an eight-hour day of employes and given them the necessary time, not to exceed one hour, for luncheon. It is the assumption on the part of the employes that the order passed by the City Council does not change this regulation.

"3. In the event you hold that the time necessary for eating lunch does not count in the hours of service, is there any assumption in the order that one hour must be allowed for lunch; in other words, would the taking of one-half hour for lunch result in terminating the day's work one-half hour earlier?

"4. Where the work is of such a nature that it is necessary to have an employe on duty after 5 o'clock, as is the case in the Bureau of Medical Inspection, the Laboratory and the Burial Permit Division, are we correct in assuming that we have the right to arrange the hours of service of such employes so that they work the required time after 5 o'clock in lieu of beginning later in the morning?"

In reply, we beg to advise you that on December 31, 1917, Section 1661 of The Chicago Code of 1911 was amended to read as follows (Council Journal, page 1816):

"1661. OFFICE HOURS.) The offices of the respective city officers, except as hereinafter mentioned, shall be open from *eight* o'clock in the forenoon to five o'clock in the afternoon on every day except Sunday, *New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day*, and from *eight* o'clock in the forenoon to *twelve* o'clock noon on Saturdays. The office of the mayor shall be open at such hours as he shall prescribe. The office of treasurer shall be open during the usual banking hours observed by the banks throughout the city. The office of the city comptroller shall be open from eight o'clock in the forenoon to three o'clock in the afternoon."

In reply to your first interrogatory, we beg to advise you that Section 1661 refers only to the offices of the respective executive officers of the City of Chicago and specifies the hours when such offices must be open to the general public for the transaction of the usual and customary business of the city in said department. Where the business of a department is such as to require the service of the employes of the city at places other than the office of the head of the department, we are inclined to believe that it is the duty of the head of the department to regulate the times when such employes are to work so as to enable the department to have the necessary work performed by the employes in the most efficient manner; provided, however, they work eight hours a day.

In other words, we are of the opinion that it is the essential intention of the City Council to require all employes of the city to work for a period of eight hours each day; but that they did not intend that employes should work from 8 a. m. to 5 p. m. in cases where it is practically necessary that they should begin and quit at different times.

In reply to your second interrogatory, we beg to advise you that the ordinance provides that the offices of the city officers shall be open from eight o'clock in the forenoon to five o'clock in the afternoon. It is not the intention of the Council to require any of the employes of the city working in offices of the City Hall to work for a greater period than eight hours each day, and we, therefore, assume that the Council intended employes to have one hour for lunch between the hours of eight a. m. and five p. m. Deducting this one hour would leave eight working hours in each day. In short, it is plainly the intention of the Council to require employes to work eight full hours each day and their lunch time cannot be counted as part of their day's work.

In answer to your third and fourth interrogatories, we beg to advise you that in our opinion some discretion is, of necessity, vested in the heads of the various executive departments to arrange the hours of business (but not the number of hours to be actually put in) in such a manner as to secure the most efficient service from the employes and to accommo-

date the public. If you have any branch in your department where it is necessary to keep such branch of the department open after five p. m. daily for the transaction of public business, we are of the opinion that it is proper for you to so arrange the working hours for employes in said branches so as to require them to work after five p. m. and, in order not to require such employes to work more than eight hours per day, you are justified in having such employes commence their day's work at an hour later than eight a. m., provided they are required to work eight full hours each day.

We do not believe that it is proper to close any of the offices of the city before five p. m. daily unless the ordinance expressly provides for the closing of such office before five p. m.

We are expressing no opinion as to the wisdom or justice of this eight-hour day requirement. We are merely giving our interpretation of the ordinance passed by the City Council.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Pension of Police Captain.

February 13, 1918.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF
THE CITY OF CHICAGO.

Gentlemen:

We beg to acknowledge receipt from you of the petition of John P. Beard in which he represents that for more than twenty years prior to his retirement he had been a member of the Police Department and served in various capacities from patrolman up to and including the office of captain of police; that for more than two years during said time he was lawfully in the position of captain of police, served as

such, and received pay therefor; that he became a captain of police by meritorious service and promotion, and received the position of captain of police in the regular way; that he was eminently qualified and served as captain of police with honor to himself and benefit to the department. Beard further represents that he was unlawfully reduced from the rank of captain to that of lieutenant of police prior to his retirement without any charges being preferred against him, without his having violated any of the rules and regulations of the Department of Police and without any reason whatsoever; that because of such illegal reduction he was technically holding the rank of lieutenant of police at the date of his retirement, but he claims that he should have been retired as a captain of police and granted a captain's pension, and that under the provisions of the act of the General Assembly of the State of Illinois, amending the Police Pension Fund Act, in force and effect July 1, 1917, he is entitled to receive a pension of \$1,100 per annum.

We have examined the record of the said John P. Beard and find that he was appointed to the Police Department September 17, 1878, and was discharged March 6, 1905, for superannuation, and that he completed a service of 27 years.

The Police Pension Fund Act in force and effect at the date of the retirement of Beard from the Police Department provided that policemen should be granted a pension equal to one-half the annual salaries paid to the rank in the department held by such officer in the twentieth year of his service. While Beard was a captain of police in the department, the rank he held in the department in the twentieth year of his service was that of lieutenant of police, and the Police Pension Board had no authority under the law, to grant him a pension in any sum except in accordance with the provisions of the Pension Fund Act, which provided that he should receive a pension equal to one-half of the salary payable to the rank in the department he held in the twentieth year of his service, and the action of the Pension Board in retiring him with a pension payable to the rank of lieutenant of police was legal and proper, and we cannot hold that he is entitled to or should

receive a pension of \$1,100 per annum as claimed in his petition.

Section 3 of the Police Pension Fund Act in force and effect July 1, A. D. 1917, provides as follows:

“Notwithstanding any provision contained in this act or the act to which this is an amendment, the pension to be paid from and after the date of the passage of this act to any person occupying the position of officer of captain of police or a position or office superior in rank thereto, who has been heretofore retired, voluntarily or otherwise, from the department and is now receiving the benefits of the act to which this is an amendment, and of this act, shall be one thousand (\$1,000) dollars per annum.”

The language of the provision of the statute is clear and admits of no doubt. Under said provisions, any person who has held the office of captain of police or an office in the department superior in rank thereto, and who has been retired, voluntarily or otherwise, from the department and is now receiving a pension, either under the provisions of the new act or the act to which this is an amendment, is entitled to receive a pension of \$1,000 per annum. This section of the statute is not limited in its application to persons who retired from the department holding such ranks either at the date of their retirement or in the twentieth year of their service in the department.

The board of trustees of the Police Pension Fund has no power, under the law, to review the act of the general superintendent of police in reducing or promoting any member of the Police Department, and the allegation in the petition of the said John P. Beard that he was unlawfully and illegally reduced from the rank of captain of police does not confer upon the Pension Board the power to review the act of the executive officials of the Police Department in reducing him from the rank of captain prior to his retirement. If he feels that he is entitled to relief for what he alleges the unlawful act of the general superintendent, this board is not the proper tribunal for him to apply to for such relief.

It is our opinion that, under the amended Police Pension Fund Act in force and effect July 1, 1917, the said John

P. Beard, having held the rank of captain of police in the department prior to his retirement, should receive a pension of \$1,000 per annum commencing July 1, 1917.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Amended Pension Act.

February 13, 1918.

TO THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND
OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your request for an opinion as to what amount of pension is to be paid to applicants and pensioners under the provisions of the amended Police Pension Fund Act in force and effect July 1, A. D. 1917.

In reply, we beg to advise you that Section 3 of the Police Pension Fund Act provides that the maximum sum to be paid as a pension shall not exceed \$1,300 per annum to any one person who retires as a general superintendent of police, or \$1,150 per annum to any person who retires as a deputy superintendent of police, or \$1,100 per annum to any person who retires as a captain of police, or \$1,000 per annum to any person who retires as a lieutenant of police, and the maximum sum for all other persons retiring shall not exceed \$900 per annum.

Paragraph B of Section 3 provides:

“After the death of any such policeman, his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him hereunder, shall receive a pension of fifty (\$50) dollars per month and an additional sum of ten (\$10) dollars per month for each of his children under eighteen (18) years of age. Should any such child cease attending school between the age of fourteen (14) and

eighteen (18) years, the aforesaid sum shall be reduced to five (\$5) dollars per month.

“Should any policeman pensioned hereunder leave no widow surviving him, or should his widow die before his children arrive at the age of eighteen (18) years, each child shall receive, while regularly attending school, the sum of fifteen (\$15) dollars per month. Pensions paid to children shall cease as to any such child upon his or her arriving at the age of eighteen (18) years.”

Section 5 of said act provides, in part, as follows:

“Whenever any person who has been appointed and sworn as a regular or probationary member of any such police force shall, while in, and in consequence of any performance of police duty, lose his life or receive injuries from which he shall thereafter die, leaving a widow or child or children under the age of eighteen (18) years, then, upon satisfactory proof being made to it, such board shall order and direct that the pension described in Section 3 hereof to be paid to the widows and children shall be paid to such widow and such child or children, subject to the limitations contained in said Section 3.

“Whenever any policeman shall die from causes other than those referred to in the preceding paragraph of this section, or be legally adjudged insane, and at such time shall have a wife (whom he has married more than two (2) months prior to his demise, or date upon which he shall be legally declared to be insane) or child or children under the age of eighteen (18) years, then, upon satisfactory proof of such facts made to it, said board shall order and direct that a monthly pension of a sum produced by multiplying the number of years of service (including the year during which such policeman shall die or become insane) by two and one-half ($2\frac{1}{2}$), be paid to his widow or wife: *Provided, however*, that such pension shall not exceed fifty (\$50) dollars per month. Each child of such deceased or insane policeman shall receive a pension as provided in Section three (3) of this act.”

Section 3 of the Police Pension Fund Act contains a provision as follows:

“Notwithstanding any provision contained in this act or the act to which this is an amendment, the pension to be paid from and after the date of the passage of this act

to any person occupying the position of officer of captain of police or a position or office superior in rank thereto, who has been heretofore retired, voluntarily or otherwise, from the department and is now receiving the benefits of the act to which this is an amendment and of this act, shall be one thousand (\$1,000) dollars per annum."

We are of the opinion that it was the intention of the General Assembly that payment of pensions granted under the provisions of the Act of 1915 should cease and determine when the amended law became effective, to wit, July 1, A. D. 1917, and that thereafter all pensions granted to persons other than those receiving the same prior to July 1, 1917, should be paid in accordance with the provisions of the amended Police Pension Fund Act in force and effect July 1, A. D. 1917. Under the provisions of the amended act the maximum amount of a pension to be paid to the widow of any police officer, regardless of the rank he held in the department at the time of his death, shall not exceed \$50 per month, and an additional sum of \$10 per month for each child under the age of eighteen (18) years, and should such children cease attending school between the ages of fourteen and eighteen years the said pension allowed them shall be reduced to the sum of \$5 per month.

We are also of the opinion that it was the intention of the General Assembly that should any policeman, heretofore granted a pension, die leaving no widow, or should his widow die before his children arrive at the age of eighteen years, each child should be granted a pension of \$15 per month while such child is regularly attending school and prior to its arriving at the age of eighteen years.

Yours very truly,

J. W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Extending Time of Building Contract.

February 18, 1918.

DR. JOHN DILL ROBERTSON, President Board of Directors,
Municipal Tuberculosis Sanitarium.

Dear Sir:

In reference to your request for an opinion as to the power of the Board of Directors of the Municipal Tuberculosis Sanitarium to extend the time of completion of contracts beyond the date specified in the contract due to the fact that unusual weather conditions prevailed over which the contractor had no control, and upon the contractor having notified the architect and the board of directors of his inability to complete said contracts within the time required owing to such weather conditions, we beg to submit the following for your consideration:

The contracts in question are as follows:

Hoeffer & Co., Bakery Extension.....	Jan. 1, 1918
Dahl-Stedman Co., General Const., Infirmary Al-	
terations	Feb. 1, 1918
Carl John Stein Co., Plumbing, Infirmary Al-	
terations	Dec. 15, 1917
J. B. Hewitt & Co., Electrical Work, Infirmary	
Alterations	Dec. 20, 1917
William A. Pope Co. Steam Heating Alterations.	

Shortly after the contracts were entered into, a blizzard prevailed for many days in the City of Chicago, and from that date, up to the date of February 6th, the streets were almost impassable for the purpose of transporting their material for this work. Many days the men were not able to secure adequate transportation to their employment. This unusual condition has not prevailed in Chicago for many years, and because of such conditions, it was impossible for any of the contractors to perform the work specified within the given time.

The contracts provide:

“The time of commencement, rate of progress and time of completion are essential conditions of this con-

tract. No extensions of time will be granted, except such as, in the judgment of the architect and owner, are justified by delays due to causes beyond the control of the contractor, as acts of Providence, unusual storms, fires (not the result of negligence), inevitable accidents and circumstances. In event of such unavoidable delays the contractor shall immediately notify the owner and architect in writing making record of same. Should any claim for extension appear just and reasonable under this contract, such extension shall be granted to cover the time of such delay as, in the judgment of the architect and owner, may appear correct, but it is distinctly understood that no extensions will be granted for any claims on account of delays caused by or traceable to inefficient management on the part of the contractor, nor for occasional days of wet weather, which time can be reasonably made up in the course of the time hereinabove stipulated."

The contract also provides:

"It is distinctly understood and agreed by the parties hereto that the work to be performed hereunder shall be completed within the time hereinabove fixed for its completion. Inasmuch as failure to complete the same within the time herein fixed will work an injury to the City of Chicago Municipal Tuberculosis Sanitarium, and as damages arising from such failure can not be calculated with any degree of certainty, it is hereby agreed that if such work is not fully completed within the time fixed herein, there shall be deducted from the contract price and retained by said City of Chicago Municipal Tuberculosis Sanitarium as its ascertained and liquidated damages the sum of fifty (\$50) dollars for each and every day passing after the date fixed for the completion until said work is fully completed as specified. It is further agreed that if the time of performance of the contract be for any reason either expressly or by implication extended, such extension shall not affect the validity of this contract or the liability of the sureties upon the bond given for the faithful performance of the same."

We are, therefore, of the opinion, that the contract in itself expressly provided for just such a condition as has arisen and provides the means of extension and sets out therein the manner in which said extension shall be made and granted; therefore, we are of the opinion that the board of

directors has the power to extend the date of completion of these contracts for a like period as the contractor was detained in the completion of the work by the unusual weather conditions.

Very truly yours,

A. B. McCOID,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contract With United Engineering Co.

February 19, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We have your letter of January 29, 1918, at hand, in which you state that a contract was entered into between the city and the United Engineering Company on April 3, 1916, for furnishing and erecting four water tube boilers in the municipal power plant at the House of Correction, and that said contract contained the following clause:

“If the work herein required shall not have been completed sufficiently for actual service in accordance with the terms of the contract and these specifications forming a part thereof, within the time of completion herein stated, and as such delay will work an injury to the city, the damages from such delay not being readily calculable, there will be deducted from the contract price and retained by the city as its ascertained and liquidated damages the sum of fifty dollars (\$50) for each day after the date of time of completion that the work herein required is not sufficiently completed for actual service;”

and stating further that said contract provided for the completion of said work in 180 days after April 21, 1916, thereby fixing October 21, 1916, as the time required for completion.

The specifications which are a part of the contract, contain the following clause:

“Should the contractor be delayed or work suspended by the city for any cause, there shall be added

to the time of completion above stated a time equal to any or all delays caused by the city, but the contractor shall not be entitled to claim damages for such delays, or suspension or extra compensation;"

You state further that the city delayed the contractor for a period of 399 days, thereby automatically extending the time of completion of said contract to November 25, 1917; further delays were encountered in completing the work, by reason of the fact that prior orders from the United States government interfered with getting the work done in time; that you deem it advisable to extend the time of completion of said contract, if it can be legally done, and that you desire us to prepare a form of notice extending the time of completion to March 1, 1918.

An examination of the contract discloses that it contains the following provision:

"All material used and all labor performed, shall be subject to the inspection and approval or rejection of said commissioner, and the City of Chicago hereby reserves to said commissioner the right finally to decide all questions arising as to the proper performance of this contract, and in case of failure by the party of the first part to comply with this contract in any manner, then to declare the same forfeited, either as to a portion or the whole thereof, and to relet the same with or without further advertisement; and in case of such default, or in any case of default to adjust the difference of damage or price, if any, which according to the just and reasonable interpretation of this contract, the said contractor should, in the opinion of said commissioner, pay the City of Chicago."

The contract also provides the following:

"Said work shall be done in accordance with plans prepared for the doing of the same on file in the office of the Department of Public Works of said city, and with the specifications appended hereto and made a part of this contract; said work shall be commenced when notified in writing by the Commissioner of Public Works, shall progress regularly and uninterruptedly, except as shall be otherwise ordered by the Commissioner of Public Works, and be finished and fully completed one hundred and eighty (180) calendar days after said notification;

the time of commencement, rate of progress and time of completion being essential conditions of this contract; provided, however, that if the time of performance of the contract be for any reason either expressly or by implication extended, such extension shall not affect the validity of this contract."

The terms of this contract are such that a large discretion is vested in the commissioner of public works as the agent of the city, to control the work under such contracts, and it is our opinion that he is authorized to act for, and bind the city in the matter of such waiver and acquiescence.

We have heretofore, on July 26, 1916, rendered an opinion to Hon. William R. Moorhouse, Commissioner of Public Works, and Hon. Eugene R. Pike, City Comptroller, in a situation having some points in common with the situation here presented, and in that opinion we have stated the following:

"We assume that such waiver, and acquiescence would be based wholly on conditions showing it to be to the best interests of the city, that they should be allowed, and not upon a mere desire to help out the contractor.

"It seems to us that the city must recognize that with respect to the time specified to the performance of contracts, the commissioner of public works under such contracts which are now under consideration must have discretion to determine whether the city will insist upon the 'letter of the bond,' it being manifestly true that sometimes it is more important to have the work finished than to have it finished at the exact time specified in the contract, and it being further true that sometimes conditions may arise, which would make it very much to the advantage of the city that the exact time limit should not be insisted upon.

"Of course, such discretion in the commissioner of public works should be exercised with great caution, and perhaps it should be added very sparingly, and in cases where its exercise is clearly proper."

The delays in this case being due first to the act of the city, and second, to the undeniable rights of the government for priority, the contractor has been subject to conditions over which he has no control; therefore, the propriety of the commissioner's actions in the premises, can hardly be questioned, and we are of the opinion that in the instant case his discretion was legally exercised.

Of course, in order to continue the liability of the surety on the bond for the faithful performance of the contract, it will be necessary to have said surety agree, in writing, that his liability shall continue in spite of the extension of the time for the completion of the contract.

We are enclosing form of notice extending the time of completion to March 1, 1918, as per your request.

Respectfully yours,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City and Its Officers for Failure to Perform Duty Imposed by Ordinance.

February 20, 1918.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

You have asked to be advised concerning the liability of the city and its officers on account of inability to make inspections required by ordinance owing to the insufficiency of appropriations for that purpose. In your letter to the City Council, under date of January 14, 1918 (Council Journal, p. 1837), you called particular attention to the inadequacy of the revenues allowed for inspectors in the Department of Steam Boilers and the Department of Buildings.

Under Section 2390 of The Chicago Code of 1911 the chief inspector of steam boilers and steam plants is charged with the duty of inspecting all boilers, tanks and other apparatus used for generating steam for power or using steam under pressure for any other purpose, etc., "as often as once in each and every year," and provides therein the method for making the various tests required from time to time.

Similarly Section 237 of The Chicago Code of 1911, as amended June 28, 1915 (Council Journal of that date, p. 906), provides that the commissioner of buildings and his assistants

shall make an *annual* inspection of all theaters, places of amusement, worship, instruction or entertainment, and *also* of all *other buildings* over two stories in height, except residences and except tenements three stories or less in height. In addition to the inspections above referred to which are required to be made annually, periodical inspections are also required by the Department of Steam Boilers and Steam Plants and the Department of Buildings, of elevators, fire escapes and many other buildings not included within the foregoing classification.

It will be seen from the above that there devolve upon the heads of these departments many positive duties imposed by the ordinances in question. The obligation resting upon them is not modified in any degree by their inability to perform the same in accordance with law by reason of the failure of the City Council to appropriate the necessary funds for the carrying on of such inspection service. It has been held that the failure of a public official to perform a plain and imperative duty cannot be excused by the fact that he has acted in good faith and with good intent.

Strickfaden v. Zipprick, 49 Ill. 286, 288.

2 McQuillin on Municipal Corporations, p. 1168.

The officials above mentioned have each filed an official bond conditioned upon their faithful performance of the duties imposed upon them by law, and it seems clear that the duty rests upon the City Council of protecting them by providing the means by which such legal obligations may be performed.

It has been shown to the City Council (Council Journal of January 14, 1918, p. 1837), that the inspectors in these departments are revenue producing, so that the appropriation by the City Council of money for a sufficient number of inspectors to properly perform the work required of these departments would not be a burden upon the city treasury but, rather, would result in a substantial increase in the revenues of the city.

The work required by the inspectors in these departments is essential to the public welfare and safety, and the public

has a right to assume that it will be performed. Under the circumstances here presented, we are of the opinion that a basis is afforded for the charge that a failure on the part of the members of the City Council to make an appropriation at this time which will be adequate to enable the departments in question to carry on this work is a wilful omission of duty.

Yours very truly,
 RALPH G. CRANDALL,
 DANIEL A. ROBERTS,
Assistants Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Power to Establish a Municipal Milk Market.

February 4, 1918.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your letter dated January 9th, with enclosure of a letter from Mrs. Rose S. Goodkind, in which you ask for an opinion as to the power of the city to establish a municipal milk market.

Clause 49 of Article V, Section 1 of the Cities and Villages Act provides that the City Council shall have power to "establish markets and market-houses and provide for the regulation and use thereof," and by Clause 50 thereof, the City Council is given power "to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables and all other provisions, and to provide for the place and manner of selling the same."

Under these statutory provisions the City Council has the power to establish markets where milk may be sold under municipal inspection and supervision, but we are of the opinion that the language of these provisions can not be construed to mean that the municipality may enter the business of buying and selling milk. Such power has not been given in ex-

press terms and it is a well settled doctrine that statutes granting power to municipal corporations must be strictly construed against the municipality claiming them. *City of Chicago v. M. & M. Hotel Company*, 248 Ill. 264.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Construction and Equipment of Buildings for Use of
Boys' School at House of Correction.**

February 20, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your verbal inquiry as to the powers of the board of inspectors of the House of Correction (first) with reference to the construction and equipment of buildings for use as a boy's school in connection with the House of Correction out of proceeds of the bond issue of \$250,000 authorized at the April, 1917, election, and (second) the power of the board of inspectors with reference to purchasing and leasing of lands for farm colonies to be maintained in connection with the House of Correction, as authorized by the act of the Legislature of June 26, 1917, we desire to state that, upon investigation of the statutes and ordinances, we are of the opinion that the board of inspectors has no duties to perform or powers to exercise concerning the purchase of said sites or the construction of said buildings.

The inspectors of the House of Correction do not constitute a separate legal entity. They only have such powers as are given to them by the statute and under the city ordinances. The powers given by the Legislature in brief are:

Power to establish and adopt rules for the regulation and discipline of said House of Correction; upon the nomination of the superintendent thereof to appoint the subordinates,

guards and officers and employes; to fix their compensation and prescribe their duties generally; to make all such by-laws and ordinances in relation to the management and government thereof as they shall deem expedient.

The statute expressly provides that no appropriation of money shall be made by the board of inspectors for any purpose other than the ordinary and necessary expenses and repairs of said institution, except with the sanction of the legislative authority of said city.

The City Council has provided that the board shall have power to make rules and regulations and also power to "award and execute contracts for the ordinary and necessary expenses and repairs of the institution; provided, that in all cases wherein the amount of such contract shall exceed the sum of \$500, the same shall be let to the lowest responsible bidder after advertising in the same manner as is provided for the letting of similar contracts by the Department of Public Works, and that no contracts shall be let for a period extending beyond the end of the current fiscal year."

The statute also provides "that the management and direction of any House of Correction already established, or which may hereafter be established in any such city, shall be under the control and authority of a board of inspectors to be appointed for that purpose."

It will thus be seen that neither the Legislature nor the City Council has given to the board of inspectors any authority to purchase or otherwise acquire lands or erect buildings. The care and management of the same and the inmates thereof, after the House of Correction has been built and equipped, and farm colonies established, is entrusted to it.

This department has had a similar question before it, and an opinion on this matter was written by Mr. George M. Bagby, Assistant Corporation Counsel, on September 17, 1908, in a matter involving the question as to the authority of the inspectors of the House of Correction to open the bids and let the contract for the erection of a contemplated building. While we are not prepared to adopt all the reasoning of that opinion, we are convinced that the conclusion reached

in it was a correct one, as it held in substance that the power and authority of the inspectors was limited to the government, management and control of the House of Correction as an institution.

Respectfully yours,

FRANK S. RIGHEIMER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Maintenance of Public Comfort Stations by Chicago Public Library.

February 22, 1918.

H. G. WILSON, Esq., Secretary Chicago Public Library.

Dear Sir:

We are in receipt of your letter of recent date in which you ask for an opinion as to whether the board of directors of The Chicago Public Library can legally use moneys collected for library purposes for maintaining public comfort stations under the sidewalk next to the library building.

It appears that the city has maintained two such public comfort stations at Garland court and Washington street and at Garland court and Randolph street, but that a letter has been received by the board of directors from the chairman of the Committee on Finance of the City Council asking that the board should take over the care and maintenance of same. It appears further that the maintenance of said stations is not designed for the benefit of persons who use the library but for the public generally, and that the board ever since the library building was erected, has maintained within the building such rooms of a similar nature as were necessary for the convenience of persons visiting the library, and that the requirements of the library do not call for comfort stations outside of the building.

Under these circumstances there is, of course, no way in which the library board can be compelled to maintain the stations in question, and we do not understand that it is the

intention to compel them to do it. As to whether the board has the right to pay out its funds for the purpose, that depends altogether on whether the use of the stations is incidental to the use of the library by the public. From the statements made to us we would say that there is no such incidental use of same, and therefore that the funds of the library can not properly be expended for the purpose.

Section 5 of the Library Act gives the library board exclusive control of "the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart" for library purposes. We do not understand that this implies that it should have the custody of the space beneath the sidewalk next to the building or maintain it for other than library purposes. Hence, there is no better reason for using its funds to maintain comfort stations at that place than at any other place, and since the purpose is not within the powers of the board it has no right to use its funds that way.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Authority of Mayor Over Police Officers.

February 25, 1918.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

In response to your oral inquiry as to the authority which the mayor has over the police force and over the officers of the Department of Police, we submit the following:

The statutes and the ordinances of the city make the authority of the mayor paramount to that of any other executive officer of the city except such officers as are members of boards or commissions with executive functions which are expressly charged with the sole duty of administering the particular functions for which they are created.

This is made clear at the very outset of Article II of the Cities and Villages Act, which relates to the duties, powers and obligations of the mayor. Section 1 of said article begins with the words, "The chief executive officer of a city shall be a mayor, etc." This alone would be sufficient to give the mayor authority over all other executive officers; but aside from this there are numerous sections of the act in which his powers are more particularly set forth, so that no matter how the above language is construed, there remains no doubt as to his authority. We will call attention only to those provisions of the law which define and amplify his powers with reference to the police force.

By Section 8 of the same article of the Cities and Villages Act, the mayor is given the power conferred upon sheriffs "to suppress disorder and keep the peace." Reference to the Criminal Code (Div. VI, Sec. 2) and to the chapter on sheriffs (Sec. 17) will show that this is equivalent to complete authority over the police of the city. By Section 13 of the same article he is given authority to call on every male inhabitant over 18 years of age "to aid in enforcing the laws and ordinances," and to call out the militia under certain circumstances subject to the authority of the governor as commander-in-chief of the militia. By Section 10 his general duties are defined as follows:

"Sec. 10. He shall perform all such duties as are or may be prescribed by law or by the city ordinances, *and shall take care that the laws and ordinances are faithfully executed.*"

Thus, it will be seen that the law imposes on the mayor the duty to enforce the law. While the ordinances of a city may provide for a marshal, or a general superintendent of police, or other officer, to head the police force, the responsibility for the enforcement of the law nevertheless remains with the mayor, who is expressly charged with the duty by statute and who is required by ordinance, as we show below, to supervise the conduct of the officers directly in charge of the Department of Police.

The powers vested by statute in the city marshal, which is an office that corresponds to that of general superintendent

of police in this city, and of other police officers, are set forth in Sections 2 and 12 of Article VI of the Cities and Villages Act. Section 2 says:

“The city marshal shall perform such duties as shall be prescribed by the City Council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws; he shall possess the power and authority of a constable at common law, and under the statutes of this state.”

Section 12 makes the marshal and his deputies, the mayor, aldermen, policemen and watchmen (if any are appointed) conservators of the peace, and clothes policemen with power to serve and execute warrants and with all other common law and statutory powers of constables.

It may be contended that the power to serve and execute warrants is not conferred on the mayor, by reason of the fact that such power is expressly conferred on policemen. We do not understand that the statute contemplates that the mayor shall not have this power, however, after it vests him with the authority of a sheriff as a peace officer. Such a construction of the statute would likewise deprive the marshal of such power, and this was manifestly never intended, since by another section he is given the powers of a constable. We read the statute rather as an enlargement of the powers of policemen, whose authority being limited to the powers of conservators of the peace in the particular section would not be sufficient unless this clause was added.

From what we have shown above, it follows that there is no authority vested in any police official by statute which is not also vested in the mayor, and in addition thereto the mayor is vested with the larger powers set forth above. Nor can this power be taken away by conferring enlarged powers on a police official by ordinance, for the City Council, in prescribing duties of officers must do so “by ordinance not inconsistent with the provisions of this act.” (Section 3, Art. VI.)

The City Council, following out the plain provisions of the statute, has vested the mayor with supervisory power over the officers in the Department of Police as well as all other

officers of the city. Section 3 of the Chicago Code of 1911 reads as follows:

"3. SUPERVISION OF OFFICERS.) The mayor shall supervise the conduct of all the officers of the city who are exempt from the provisions of the Civil Service Act, and shall examine the grounds of all reasonable complaints made against any of them, and cause their violations of duty and other offenses, if any, to be promptly punished."

The supervisory authority thus given to the mayor is in harmony with the statutory authority vested in him and does not conflict in any way with the provisions of the ordinances prescribing the duties of the various officers of the city.

The ordinances relating to the Department of Police also contain provisions carrying out the theory that the mayor has complete authority over the police. Thus, we find in Section 1910, as amended in the police reorganization ordinance (Council Journal Dec. 30, 1912, pp. 3019-27), the following provision:

"It shall be the duty of said General Superintendent of Police to preserve the peace and secure good order and cleanliness within the City of Chicago, and to that end he shall enforce all laws and city ordinances and the orders of the City Council and of the Mayor of the City of Chicago."

In Section 1913 as amended (Council Journal Nov. 29, 1915, pp. 2381-3), appears the following:

"The First Deputy Superintendent of Police, under the direction of the General Superintendent of Police, shall be charged with: (1) The enforcement of all ordinances of the City of Chicago and orders of the City Council and of the Mayor of the City of Chicago."

We find, therefore, that the ordinances, not only give the mayor supervisory authority but expressly provide that his orders shall be followed by the officials of the Department of Police.

If necessary, we could enlarge on the supervisory authority given by ordinance and show that such supervisory authority is in fact complete authority. It would not be necessary to go beyond the police reorganization ordinance to dem-

onstrate this, for in that ordinance the words "supervise" and "supervision" are used repeatedly as conferring full authority. Thus, in Section 1912, the first deputy superintendent is given supervision of the active bureau, and the second deputy is given supervision of the clerical, mechanical and inspection bureau, in Section 1915e a lieutenant is named to supervise the miscellaneous division, in Section 1915h the chief surgeon is given general supervision over the duties and conduct of ambulance surgeons and other employees, etc.

This makes it clear that when the Council gave the mayor supervisory authority over the conduct of the officers of the city it gave the authority contemplated by statute to control their action. Add to this the express authority to give orders to the officials in the department, and it becomes manifest that the mayor stands somewhat in the relation of a commander-in-chief of the police forces of the city.

Our conclusion, therefore, is that the mayor has control over the police officers of the city, and while he is bound to observe the laws and ordinances in the same manner as the officers directly in command, his authority within the limitations of such laws and ordinances is complete, and the executive officers of the Department of Police are bound to observe his orders.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Use of Municipal Foundry.

February 28, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

In reply to your request, dated February 27, 1918, for an opinion in regard to the proposition of the Greenlee Foundry Company to utilize, in part, the Municipal Foundry, we beg

to state that our understanding, on which we base this opinion, is that the essential facts are substantially as follows:

The Greenlee Foundry Company is engaged in manufacturing for the Government of the United States certain machinery, for the early completion of which there is an urgent necessity. This machinery is needed in connection with the prosecution of the war against Germany.

The plant of the Greenlee Foundry Company is taxed beyond its capacity; so that it is obliged to have certain parts of such machinery, to-wit, cores, produced for it by others.

The Municipal Foundry is equipped to produce such parts and is able to do so without seriously interfering with its ordinary work for the city, except that some additional help will be required.

The Greenlee Foundry Company is willing to enter into a satisfactory arrangement so that the city will lose nothing, and, probably, will make considerable profit by the production of such parts in the Municipal Foundry.

Now our understanding is that the city owns and operates the Municipal Foundry in its private capacity; and that it may use or permit the use of such plant for any legitimate municipal use.

The Government of the United States is engaged in a great war. The City of Chicago, as a constituent part of the United States, is engaged in that war.

If the enemy were advancing upon the city, in close physical proximity thereto, we think it would be a legitimate municipal use of the Municipal Foundry, to use it in the production of war machinery proper and necessary to repel the threatened invasion. The danger to the city is now no less real, though not so immediate, because of the absence of such close proximity of the enemy.

We are of the opinion, therefore, that it would not be diverting the Municipal Foundry to an unauthorized use to allow it to be used, under proper arrangements, in the production of machinery needed by the government of the United States in carrying on the war.

Under existing conditions there is, as we understand, no necessity that the production of such war machinery should

interfere with the use of the Municipal Foundry in supplying the city's ordinary requirements; and we desire you to understand that this opinion is limited to such existing conditions. Should the necessity referred to arise, please again bring this subject to our attention.

A practical suggestion, owing to the city's depleted financial condition, is that any arrangement you make with the Greenlee Foundry Company should take the form of granting to that company the right to use a part of the Municipal Foundry (not presently needed to produce the city's requirements) for a proper compensation, which, among other things, will include the payment by the company of the payrolls arising from the manufacture of such war machinery.

We believe that the mayor, as chief executive of the city, has the power to authorize you to make the arrangement hereinbefore suggested; and we have submitted this letter to him and he authorizes you to make such arrangement with the Greenlee Foundry Company along the lines above indicated, as, in your judgment, is proper. If, in addition, you desire also to bring the matter to the attention of the City Council we perceive no objection to your doing so.

Obviously this opinion is based upon the existence of extraordinary business under extraordinary conditions; and should never be applied to ordinary business, in ordinary times and under ordinary conditions.

Very truly yours,

CHESTER E. CLEVELAND,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Regulation of Wholesale and Retail Junk Shops.

March 5, 1918.

HON. JOSEPH I. NOVAK, Chairman, Subcommittee of the Committee on Licenses.

Dear Sir:

We are in receipt of your communication of March 4, forwarding to us an ordinance regulating wholesale and retail

junk shops, and requesting us to render you an opinion as to the legality of said ordinance.

In reply, we beg leave to advise you that the ordinance in question amends Articles II and III of Chapter 66, comprising Sections 2249 to 2270, both inclusive, of The Chicago Code of 1911. The ordinance defines the meaning of the terms "junk," "junk store," "junk yard," "junk wagon," "junk boat," "junk dealer," "retail junk dealer," and "wholesale junk dealer," and provides for the regulating and licensing of wholesale and retail junk stores and junk yards as well as junk wagons, and regulates the location of junk stores and junk yards, both wholesale and retail, by providing for frontage consents before the issuance of a license to any applicant.

We have carefully read the ordinance and find that express power has been conferred upon the City Council to pass an ordinance of this character by virtue of Clause 95 of Section 1 of Article V of the Cities and Villages Act, which provides as follows:

"The City Council in cities * * * shall have the following powers:

"*Ninety-fifth*: To tax, license and regulate second-hand junk stores and yards, and to forbid their purchasing or receiving from minors without the written consent of their parents or guardians any article whatsoever, and to direct the location thereof."

Prior to 1911 there was grave doubt as to the power of the City Council to regulate the location of junk shops and junk yards, and in that year Clause 95 was amended by adding to that paragraph, which referred to junk stores, or junk shops, and junk yards, the words:

"and to direct the location thereof."

The General Assembly thus conferred upon the City Council express power to regulate the location of junk stores or junk yards and to provide under what circumstances junk stores or junk yards might be located. The ordinance in question requires frontage consents in order to locate junk stores or junk yards.

The question of the power of the City Council to regulate the location of junk stores or junk yards and to require frontage consents before granting a license to applicants who desire to operate any junk stores or junk yards was passed upon by the Supreme Court in the case of *Smolensky v. City of Chicago*, 282 Ill., page 131. The Supreme Court construed Section 2267½ of The Chicago Code of 1911, which section was passed on March 26, 1917, and is as follows:

“It shall be unlawful for any person, firm or corporation to locate, establish, conduct or maintain any junk shop or junk yard in the city, either at wholesale or retail, on any lot fronting on any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence and wholesale or retail store purposes or used exclusively for wholesale or retail store purposes, or within 100 feet of any such street in any such block, without the written consent of a majority of the property owners, according to frontage, on both sides of the street.”

The court held that the City Council had power to regulate the location of retail or wholesale junk shops or junk yards and to require frontage consents in order to obtain a license to conduct said business, and that the city officials could not be restrained from prohibiting the location of a junk shop or a junk yard where the person conducting the same had failed to secure frontage consents as required by the ordinance.

We are, therefore, of the opinion that the ordinance as drafted will be sustained by the courts as a valid exercise of the power conferred upon the City Council to license, regulate and locate junk shops.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Approval of Vacation of Plats.

March 7, 1918.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

In referring to your communication of February 26th, addressed to Honorable John C. Kennedy, alderman of the 27th Ward, in reference to the approval of vacation instrument to be approved in conformity with the amendment of Section 6 of the statute on plats, passed by the last session of the Legislature, said act, as amended, being as follows:

“§6. Any such plat may be vacated by the owner of the premises, at any time before the sale of any lot therein, by a written instrument, to which a copy of such plat shall be attached, declaring the same to be vacated. Such instrument shall be approved by the city council or village or county board (as the case may be) in like manner as plats of subdivisions. Such council or board may reject any such instrument which abridges or destroys any public rights in any of its streets or alleys. Such instrument shall be executed, acknowledged or proved, and recorded in like manner as plats of subdivisions; and being duly recorded, shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat adjoining in the execution of such writing.”

Before said amendment was passed, said act provided that the owner of the premises desiring to vacate any plat or part thereof might do so by recording a written instrument, with a copy of the plat attached, in the recorder's office, but under the above amendment, before said instrument becomes effective, it must first be approved by the City Council in like manner as plats of subdivisions.

Chapter 24, Article X, Paragraph 173 of the Cities and Villages Act, Hurd's Illinois Revised Statutes of 1915-1916, page 321, is as follows:

“173. MAPS—APPROVAL OF.) §5. The city council or board or trustees shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board of trustees, or to some officer to be designated by such council or board of trustees, for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county, or have any validity until it shall have been so approved.”

The manner in which plats or subdivisions are approved has been delegated under the above statute by ordinance of the City Council to the superintendent of maps, whose duty, under said ordinance, Section 2095, of The Chicago Code of 1911, page 660, is as follows:

“2095. DUTIES—PLATS.) He shall be *ex officio* examiner of subdivisions, and it shall be his duty to examine any map, plat or subdivision of any block, lot, sub-lot or part thereof, or of any piece or parcel of land, situated within the City of Chicago, presented or submitted to him for approval, and if he approve of the same, he shall so certify.”

Under the above section of said ordinance, no power has been delegated to the superintendent of maps for the approval of vacation instruments and plats as provided under Section 6 of plats as amended by the Legislature under the Act of 1917.

We, therefore, submit herewith an order to be passed by the City Council approving the vacation instrument accompanying your communication and authorizing the superintendent of maps to execute such approval; also, a form of endorsement of approval by the superintendent of maps.

Yours very truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Suppression of Suggestive Song.

March 7, 1918.

HON. JOHN H. ALCOCK, Acting Chief of Police.

Dear Sir:

Replying to your oral inquiry as to your power, under the ordinances of the City of Chicago, to suppress, in accordance with the request of Federal authorities, the sale and circulation of a song recently published, entitled "There Will be a Hot Time for the Old Men When the Young Men are Away," we beg to say that The Chicago Code of 1911 contains the following provision:

"2024. INDECENT OR LEWD BOOKS, PICTURES, PLAYS, ETC.) No person shall exhibit, sell or offer to sell or circulate any indecent or lewd book, picture or other thing whatever of an immoral or scandalous nature, or shall exhibit or perform any indecent, immoral or lewd play or other representation, under a penalty of not less than twenty dollars nor more than one hundred dollars for each offense."

If the song in question were considered apart from the extraordinary conditions now prevailing, which give rise to the departure of thousands of young men from their homes to enter the army and which in turn provides the material for the song, we should regard it as merely one of many songs that from year to year find their way into circulation which are on the border line of impropriety because of their suggestive nature, but would not warrant unusual action on the part of governmental authorities. This song, however, makes its appearance at a time when the country is engaged in war and its character and effect must be considered in the light of existing conditions. While the words used in the song are not in themselves objectionable, the song as a whole lends itself to a construction which is suggestive of unbecoming, if not improper, conduct on the part of persons having obligations of loyalty to men who have entered the military service. It is calculated to convey an unwholesome impression and will doubtless be given an interpretation by depraved or corrupted minds suggestive of indecency and immorality.

In the case of *United States v. Males*, 51 Fed. 41, 42, the court said:

“Statutes against obscenity should receive a reasonable construction, having regard to the manifest object had in view in their enactment. The obvious purpose of their enactment is to guard and protect the public morals, by erecting barriers which the evil-minded and lascivious may not overpass with impunity. * * * The test is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands such matter may fall. The writing need not use words which are in themselves obscene, in order to be obscene. Courts have regard to the idea conveyed by the words used in the writing, and not simply to the words themselves. Obscenity is that form of indecency which is calculated to promote the general corruption of morals.”

We think that when the song is considered in relation to prevailing conditions, it can very properly be regarded as falling within the prohibition of the ordinance. Not only does it permit a construction suggesting immorality, but the song is so inappropriate, unpatriotic and mischievous in view of its bearing upon the military situation that we believe it may properly be considered as “scandalous” matter which the ordinance seeks to condemn. The Century Dictionary defines “scandalous” as “exciting reproach or reprobation; extremely offensive to the sense of duty or propriety.” The sentiments expressed in this song we believe may be regarded as having such a deplorable tendency that, under the unusual conditions now prevailing, you are authorized to enforce the ordinance referred to against all persons exhibiting, selling or circulating the song in question.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Building Inspectors Laid Off on Account of Reduction in Appropriation.

March 7, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir :

Your letter concerning the discharge of certain employes in the Department of Buildings was referred to the undersigned for consideration and reply.

You state in same that the commissioner of buildings, anticipating a reduced appropriation for his office, on March 1st laid off seven building inspectors, and that those men protest his action on the ground that the appropriation bill will not become a law until March 11th, ten days after publication.

You also call attention to the fact that there is a lump sum appropriation for building inspectors in the appropriation bill of 1917 and that the City Council on December 31, 1917, directed the amount to be expended during the current year until such time as the current appropriation bill was passed, to be in proportion to that appropriated for 1917. In other words, the question is whether these employes are entitled to ten days' more work.

This question can be answered from two different standpoints. First, as to whether the commissioner of buildings had the right to lay off the men from motives of economy or with the intention of benefitting the city, and second, as to whether the city officers are justified in retaining employes that they consider unnecessary during this disputed period.

There can be no doubt whatever concerning the right of the commissioner of buildings to lay off the men during the period in question if he acts in good faith from motives of economy, believing that it is necessary to do so in order to keep within his appropriation, or, if he does not find it necessary to retain the men. This has been definitely settled in the case of *Thomas v. City of Chicago*, 273 Ill. 479, and is no longer open to argument.

On the other hand, it is our opinion that if such men are necessary and it is for the best interests of the city to keep

them at work for the ten day period mentioned, it is within the power of the city administrative officers to retain them.

We base this opinion on the weight of authority in matters of this kind. The ordinance which authorized the retention of employes employed under the 1917 appropriation bill (Council Journal, December 31, 1917, page 1828) provided that such employes could be paid "until the passage of the 1918 appropriation bill."

There is some conflict of authority as to what is meant by the "passage" of a bill. The word is used in several senses. It is spoken of frequently as the adoption of a measure by one of two houses of the General Assembly. At other times it is intended to mean the final adoption of the bill by the two Houses of the Assembly. Again, it is frequently intended to mean either the adoption by the legislative branch and the signature of the executive. And finally, it is applied in the sense of the time of taking effect of the legislative act.

It is held in some cases that where there is nothing in the act requiring a resort to technical or secondary meanings of the words the phrase "passage of this act" must be understood as the time when the act was actually passed and approved.

Cordiner v. Dear, 55 Wash. 479;

Jackson v. State, 101 Ark. 473;

Denver & R. G. R. Co. v. Brenneman, 45 Colo. 264.

On the other hand it is almost uniformly held that where the act refers to its passage as the time for taking affirmative action under the act it must be construed as meaning the time of taking effect of same.

We have found a number of authorities which contain the words "prior to the passage" and in those cases it seems that the weight of authority inclines in favor of construing the words as relating to the time of taking effect and not to the time of passage by the legislative branch of the government or approval by the executive.

Scales v. Marshall, 96 Tex. 140;

State v. Williams, 173 Ind. 414.

Since these authorities referring to a period "prior to the passage" hold this way, we do not believe that it is incumbent on us to review or closely analyze the large number of cases in which fine distinctions have been drawn as to the meaning of the word "passage" in individual enactments where the question has been raised.

It is our opinion, therefore, that while the employes who are protesting their discharge have no right to compel the commissioner of buildings to reinstate them if the commissioner acted in good faith as above indicated, nevertheless, if the commissioner had retained the men it would have been entirely proper to regard them as within the provisions of the ordinance authorizing the retention of employes until the passage of the annual appropriation bill for the year 1918.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Conditions Existing in Streeterville.

March 8, 1918.

HON. JOHN H. ALCOCK, Acting General Superintendent of Police.

Dear Sir:

We have had referred to us your request of March 7, asking our opinion regarding your duties and powers in dealing with certain conditions in "Streeterville" disclosed in a letter which you received from Captain James Gleason, and which states the following:

"First: Opposite the 'Sunday' Tabernacle at the southwest corner of Fairbanks Court and Chicago avenue there is a section of ground, and one party claims to have a permit from Capt. Streeter to use this ground for parking purposes and another party claims to have a permit from the Bowes Realty Co., which represents the A. L. Farwell interests, for using this property for parking purposes. We are unable to determine who is right in

the matter and this may lead to serious trouble; however, we will preserve the peace.

“Second: Therefore it is requested that an opinion be obtained from the corporation counsel to ascertain who has the legal right in this matter and as to what action should be taken.

“Third: At present we are preserving the peace and allowing no work to proceed outside the building line.”

In reply to your inquiries, we desire to state that so far as we are advised, the courts have uniformly held against Streeter's claims of ownership of the land here involved, commencing with the case of *People v. Kirk*, 162 Ill. 138, and ending with a decision rendered as late as February 23, 1918, by Judge Pinckney in the Circuit Court of Cook County after a trial lasting several weeks. Captain Streeter, however, has the right to appeal from the latest decision, and in view of the fact that for many years he has persisted in his claims in spite of adverse decisions by the courts, it is reasonable to suppose that he will continue to litigate and raise questions as to the legal title of land in Streeterville. The private controversy which you mention is one of the manifestations of these unsettled conditions.

We are of the opinion that it is not one of the functions of the Police Department to adjust private differences. Such controversies should be tried in the proper forum where rights may be established and protected by injunction proceedings and otherwise. If you are preserving the peace and enforcing the observance of the laws and ordinances, that is all that is required of you. Of course, if the parties to the controversy attempt to settle it outside of court and in the district by unlawful means or without the forms of law, it will be necessary for you to act in the premises as you would in any other case involving a like situation, that is, to arrest all disturbers of the peace and maintain order.

Respectfully yours,

FRANK S. RIGHEIMER,

Acting First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

**Right of Superintendent of House of Correction to Refuse to
Take Prisoners Convicted of State Offenses.**

Chicago, March 12, 1918.

HON. JOSEPH SIMAN, Superintendent of House of Correction.
Dear Sir:

We are in receipt of your letter of recent date asking whether you have the right, as superintendent of the House of Correction, to refuse to accept prisoners sentenced to that institution under state charges, in view of the fact that the County of Cook has declined to pay for their maintenance while there. We assume that you include in your presentation of the case the further fact that the state's attorney takes the position that no agreement exists between city and county for the care and maintenance of such prisoners and that your question is directed to this point as well as to the point that there is a refusal to pay on the part of the county.

It is our opinion that the city is not bound to keep these prisoners without pay, but we do not go so far as to say that you have the right to refuse to take them unless appropriate action is taken by the City Council. If the City Council acts you will then have the right to refuse them.

The statutes seem to contemplate the use of a common workhouse or house of correction by both city and county only when an agreement between their respective officers has been arrived at.

The following powers are given to the City Council by Art. V, Sec. 1, Clauses 69 and 70 of the Cities and Villages Act (Hurd's 1915-16 Rev. St., p. 308):

"Sixty-ninth. To establish and erect calaboooses, bridewells, houses of correction and workhouses for the reformation and confinement of vagrants, idle and disorderly persons, and persons convicted of violating any city or village ordinance, and make rules and regulations for the government of the same, and appoint necessary keepers and assistants.

"Seventieth. To use the county jail for the confinement or punishment of offenders, subject to such conditions as are imposed by law, and with the consent of the county board."

The county commissioners are given the power, under Section 25 of the County Act (Hurd's p. 716) :

"To cause to be erected, or otherwise provided, a suitable workhouse, in which persons convicted of offenses punishable by imprisonment in the county jail may be confined and employed, and to make rules and regulations for the management thereof. They may contract for the use of the city workhouse when the same can satisfactorily be done."

The powers granted by the above provisions are very general, and it may be held that it was the intention of the Legislature to confer authority on the respective governing bodies of the city and county to do the things which are more specifically provided for by the act authorizing the establishment of houses of correction, in order that no question could be raised as to which was the proper governmental agency to enter into a contract such as is contemplated.

The Criminal Code has certain provisions relating to the imprisonment of convicted persons in the House of Correction, which apparently do not take into account the necessity of an agreement between city and county. We refer to such sections as 168 to 168c, 448, 449, 450, etc. But, on the other hand, none of these provisions are of such a mandatory nature that the imprisonment must necessarily be in the House of Correction. Hence, we do not construe these so that they give the right to the courts to use the House of Correction for such purpose without an agreement of this kind.

It is our opinion, therefore, that the right of the courts of the county to designate the House of Correction as the place of incarceration for prisoners convicted of state offenses depends on the agreement, which may or may not be made, provided for in the act relating to the establishment of houses of correction. If anything further were needed to settle this point, it would be found in the attitude of the courts themselves as expressed in each mittimus of the Criminal Court by which a prisoner is sent to the House of Correction. This mittimus contains the following language immediately preceding the judgment:

"And it appearing to the court that there is an

agreement existing between the said County of Cook and the City of Chicago in said county, to receive and keep in the House of Correction of said city all persons who may be sentenced or committed thereto by the courts of record of said county; * * *''

Section 8 of the act relating to houses of correction (Hurd's p. 1439) contains the provisions which must be followed in order that the county may lawfully use the House of Correction for the imprisonment of persons convicted of state offenses. This section reads as follows:

"Section 8. The Board of Supervisors or commissioners of any county, and the Board of Trustees of any village or town, in any county in this state in which a House of Correction is established, shall have full powers and authority to enter into an agreement with the legislative authority of such city, or with any authorized agent or officer in behalf of such city, to receive and keep in said House of Correction any person or persons who may be sentenced or committed thereto, by any court or magistrate, in any of said counties. Whenever such agreement shall have been made, it shall be the duty of the Board of Supervisors or commissioners for any county in behalf of which such agreement shall have been made, or of the trustees of the village or town, in behalf of which such agreement has been made, as the case may be, to give public notice thereof, in some newspaper printed and published within said county, for a period not less than four weeks, and such notice shall state the period of time for which such agreement will remain in force."

It will be seen from the above that the Board of Trustees of any village of the county has the same right to contract with the city authorities for the keeping of the prisoners of such village for violation of village ordinances as has the County Board for the keeping of prisoners convicted of state offenses. To assume that the right of these village boards to send prisoners there without such a contract or agreement would be manifestly absurd. In our opinion it would be equally absurd to hold that the County Board has such right. We feel convinced that the county has no right to use the House of Correction without an agreement with the city authorities.

As to the kind of agreement that must be entered into, that is a question which we do not feel called upon to discuss in this opinion. It is sufficient here to state that the county has repudiated the agreement that is supposed to exist both by refusing to pay for the keeping of prisoners and by the express declaration of the state's attorney. It will be noted that the statute does not say that there must be a written contract. There was a written contract made in 1888, which by its terms was to continue in force from year to year. Another written contract was made for the year 1891. The county continued to pay the city until some time in 1907 or 1908. Whether this amounts to such an agreement as will make the county liable for the keeping of prisoners from the time it stopped paying until the present time will probably have to be settled by court proceedings. Since the county declares that it is not bound by any agreement heretofore entered into, it may be said that whatever agreement there was will no longer be in force when the city has taken action which will formally annul same. Consequently, the only question that remains to be disposed of is how the city is to proceed in order to relieve itself of further obligation to receive prisoners.

There does not appear to be any provision of either the statutes or the ordinances of the city which expressly places into the hands of either the superintendent or the Board of Inspectors of the House of Correction the power to make contracts with the county authorities for the keeping of prisoners. Wherever this matter is referred to it is spoken of as a contract or agreement between the city and the county. Since this is not specifically set forth as among the powers or duties of the Board of Inspectors, we must apply a familiar rule of construction to the effect that the board can only exercise such powers as are expressly conferred or necessarily implied. It is true that an argument could be advanced on the theory that this power is necessarily implied, and we do not want this opinion to be understood as negating such a theory. But we feel, after giving the matter the most careful attention, that it would be better for the City Council to take

formal action in regard to this agreement, rather than to advise you that you have the right to refuse prisoners.

In pursuance of the conclusion we have reached, we have prepared and forward herewith draft of a resolution for submission to the City Council formally declaring the contract at an end and directing that notice be given by the Board of Inspectors to the Board of County Commissioners and to the chief justices of the Criminal and Municipal Courts to that effect. We recommend that the matter be placed before the City Council by the Board of Inspectors, so that prompt action may be taken.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Appropriation for Twelfth Street Bridge.

March 19, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Your letter of recent date in which you call attention to the appropriation for the viaduct on east and west 12th street was referred to the undersigned for consideration and reply.

It appears that the City Council in its annual appropriation bill (Council Journal February 20, 1918, page 2172) appropriated \$514,650 for the viaduct in question, said amount being the net amount after reimbursement of \$791,350 by the railroad companies interested.

There is nothing about this appropriation which makes it different in any way from any other appropriation, except that it was not included in the recapitulation of appropriations, which appears on page 2173 of the same Journal. The reason for its not having been placed in that recapitulation appears to be that it was assumed that the work would not

have progressed far enough by the end of the year to necessitate drawing on this money.

This is further borne out by the fact that an item appears in the recapitulation on page 2198 of the same Journal which reads "to be reimbursed \$579,650." This sum seems to tally with the two appropriations made for 12th street bridge and Monroe street bridge. There is nothing to indicate, however, that those were the sums to be reimbursed except that the amount is the same.

Whether there is a reimbursement of this money or not, the appropriation as it stands is good and can be used. There is nothing in the statute which requires that an appropriation should be mentioned twice in order to make it binding. In other words, it does not follow that because it is omitted from the recapitulation which appears on page 2173 that the appropriation is invalidated.

In our opinion, the amount being specified and the purpose being specified, the appropriation comes squarely within the provisions of the statute and you have a right to proceed with the work on the structure in question and draw on same.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Contractor for Municipal Tuberculosis Sanitarium Buildings.

March 20, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

DEAR SIR:

You submitted to this department the bill of J. W. Snyder Co., Contractors, for Buildings Two and Four of the Municipal Contagious Disease Hospital now being erected, with a request for an opinion as to the city's standing in the matter.

It appears that this company was the contractor for installing the caissons in the buildings in question; that under their contract it was required to install 112 caissons and that of this number 20 or more were sunk at a point where the water gathered and had to be pumped and bailed out. The contractor claims extra compensation in the sum of \$1,959 for this work.

We have examined the specifications and contract carefully and are of the opinion that so far as any legal liability of the city is concerned the claim can be successfully resisted, although there are equitable features about the case which brings it within that class of cases that the City Council may appropriate for if it sees fit. The report of the efficiency staff which was submitted with the other papers outlines the case as strongly from the legal standpoint as we can ourselves present it. The contract was let on specifications which contained the following:

“Before submitting a proposal bidders shall visit the site and examine the present condition thereof; examine all portions of the drawings and this specification and fully inform themselves in regard to existing conditions and limitations applying to this work, estimate to take the site as it shall be found and include in the proposal a sufficient sum to cover the cost of the performance of all labor and the furnishing of all materials required to attain the completed condition of the work contemplated by the contract.”

The specifications did not indicate at any place the kind of soil that would be encountered and it was clear that it was the intention to require the contractor to take the risk of any kind of soil that was to be found. It is also clear that it was contemplated by the specifications that some water would be encountered, as will appear from the following taken from paragraph 31 of the specifications:

“The excavations and the site must be kept free from water by use of hand or mechanical pumps of ample capacity to remove all water until concrete work is installed.”

The contract was in the usual form requiring that in case any extras were to be allowed authority for paying same

would have to be obtained beforehand through express authorization by the City Council and ordered in writing by the commissioner of public works.

When all these matters are considered it must be plain that no legal liability for these extras exists.

On the other hand, we find that there is a basis for the claim in the rules and agreements adopted by the Illinois Society of Architects, the Western Society of Engineers and the Chicago Masons and Builders Association. A handbook is published containing these rules and agreements which is recognized as a standard in the building trades. Under one of these rules pumping or bailing is listed as being subject to an additional price. The rule is as follows:

“Pumping or bailing when required to be done at special price, in addition to excavation unit price, as the excavation rules are based on dry work; this, however, does not apply to rain or storm water.”

There are other rules contained in the book which are of a similar nature and contemplate the payment of extra compensation for pumping and bulkheading.

In order to arrive at the true situation the writer conferred with the city architect. The latter says that in drawing his specifications he always seeks to avoid putting in specifications which indicate an intention to pay for extra work. But that it is the practice of builders, architects and engineers generally, to follow the rules above mentioned and make allowance as is provided for therein. Otherwise contractors would be bound to take extraordinary risks that would not result in benefit to the building trade in general.

In this instance, the contractor, when he discovered the water, gave notice to the commissioner of public works that he would make a claim for extra compensation and wanted to stop the work until the necessary authority from the City Council was obtained. It is obvious, however, that the stoppage of the work while the water was coming in would not have been the proper thing to do. He was therefore requested to go ahead and a city employe was delegated to check up on the extra work. The bill is itemized correctly and the amount

of work has been checked up, so that if there is any allowance at all the claim is for the correct amount. Under these circumstances it is entirely within the discretion of the City Council to make an allowance for such extra work, since the claim is not subject to any question as to the good faith of the contractor and represents an actual loss which the contracting company will sustain if it is not recognized.

The whole matter being peculiarly within the discretion of the City Council and not a question of law, we do not feel called upon to make any recommendation. We have endeavored to explain the status and we have pointed out that the City Council has the right to pay for these extras if it sees fit to do so.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Payment of Interest on Moneys Advanced for Payrolls, Etc.

March 23, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You forwarded to us a voucher drawn for the purpose of paying interest on certain notes discounted on behalf of the Committee on Gas Litigation, with a request to be advised as to the liability of the city thereon.

The voucher indicates that in order to meet payrolls and other necessary expenses from August 29, 1917, to February 6, 1918, money was borrowed from certain banks at six per cent per annum. The interest on the same amounts to \$524.06, which the city is now asked to pay.

We know of no provision of the law under which such an expense is properly chargeable to the city, even though

the voucher may represent an indebtedness which the committee regarded as authorized under the general appropriation made for the purposes of the gas litigation for the year 1917.

The law is well settled that a municipal corporation cannot be held legally liable for interest in the absence of an express agreement therefor. (See *County of Coles v. Goehring*, 209 Ill. 142, 163, and cases there cited.)

It may be said in this case that there was an agreement to pay interest, but that raises the question of the authority to borrow the money. It is possible that a debt might have been created by the committee on which the city would be bound for interest, but not on borrowed money.

The City Council itself has no power to borrow money except in the way authorized by statute. It may issue bonds and it may dispose of tax anticipation warrants. The right to do these things is expressly conferred by statutes, which also specify in detail the manner in which they are to be done. Since there is no power vested in the City Council to borrow money in any other way, there can be no such power conferred on a committee of the Council.

It could only enter into such contracts as are within the scope of its powers and within the purpose of the appropriation made therefor.

We do not by this opinion pass on the question of the right of the committee to incur expense after its appropriation was exhausted, since that was not involved in your inquiry.

We return herewith the voucher which you submitted to us.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Salaries of Probation Officers.

March 23, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You have asked to be advised if the salary of the probation officers of the Municipal Court are fixed by statute or by the judges of the Municipal Court or by the City Council.

The provision of the Adult Probation Act which relates to these officers was passed in 1915 and appears as Section 14 of that act (Hurd's Rev. Stat. 1915-1916, pages 966 and 967). The portion of said section which is to be considered in this connection reads as follows:

"§ 14. The amount of compensation to be paid any probation officer or chief probation officer appointed by any circuit court shall be determined by the Board of Commissioners or supervisors of the several counties in which said officers respectively are appointed, and shall be paid by the county treasurer on the warrant of the county comptroller or other person authorized to issue warrants on the county treasurer; the amount of compensation to be paid to any probation officer appointed by any municipal or city court shall be determined by the city council of the city in which such municipal or city court is situated, and shall be paid out of the city treasurer [treasury] on warrants drawn for that purpose; the compensation to be paid to any chief probation officer appointed jointly by the judges of the circuit court of any county, and the judges of any municipal or city court, as provided in Section 9 of this act, shall be equally apportioned between the county and the city, the judges of whose courts made such appointment as aforesaid, and the amount thereof shall be fixed by said judges and approved by the board of county commissioners or supervisors of such county and by the city councils of the cities for which said chief probation officer is appointed as aforesaid; *provided, however*, that the compensation paid any chief probation officer in counties of the third class shall not exceed five thousand dollars (\$5,000) a year; the compensation of each of not more than three assistant probation officers in counties of said class shall not exceed eighteen hundred dollars

(\$1,800) a year, and the compensation of any other probation officer in counties of said class shall in the case of probation officers of the circuit court be fixed by said court with the approval of the county board and in the case of probation officers appointed by a municipal or city court, by said municipal or city court with the approval of the city council, but shall not exceed fifteen hundred dollars (\$1,500) per annum."

It will be seen from the above that where the chief probation officer is appointed jointly by the judges of the Circuit Court and the judges of the Municipal Court, as is the case in this city, the salary is to be equally apportioned between the county and the city, and the amount thereof is to be fixed by the said judges and approved by both the Board of County Commissioners and by the City Council, and said salary is limited to \$5,000 a year. Hence it requires the concurrence of both the County Commissioners and the City Council before the salary can be fixed, although the judges may designate, or, as the statute says, may "fix" the salary.

In the case of the other probation officers appointed by the Municipal Court, the compensation is "fixed" by the Municipal Court, but requires the approval of the City Council, which, as we understand it, means that such salary is not really settled until it is approved by the Council. The Council in this way has a check on such salaries.

We call attention to the fact that the statute provides that the salaries of probation officers, other than the chief officer and three assistants, shall not exceed \$1,500 per annum. The salary fixed by the City Council in the current appropriation bill is \$1,620 per annum. There does not appear to be any authority for exceeding the limitation imposed by statute.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Water Rates for Y. M. C. A. Hotel.

April 1, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We have before us copy of a letter addressed to the corporation counsel in relation to the claim of the Young Men's Christian Association of Chicago for exemption from water rates under Section 2755 of The Chicago Code of 1911. The original of this letter, apparently written a long time ago, is not in our possession, and the copy was sent to us only recently.

The portion of the ordinance in question which is to be interpreted reads as follows:

"The commissioner of public works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution, or which have been heretofore or may hereafter be levied and assessed against any armory of the National Guard."

The question presented is whether the hotel is property used in the "immediate conduct or carrying on" of a "charitable, municipal, religious or educational" purpose.

The information obtained by the field assessor of water rates is to the effect that the Y. M. C. A. Hotel is a large institution containing 1,821 rooms. It was put up at an expense of \$1,350,000, about half raised from donations and the balance borrowed. It ran for a considerable time at a loss, although the management expects to make it self-sustaining. The rooms are small, and rent for from 30 cents to 50 cents a day. There are no weekly rates, and there is a rule prohibiting a guest from staying more than 30 days. There are certain features about the place which in some degree conform to those in other hotels, such as restaurant and telegraph

facilities, etc., others which differ materially, such as a room for entertainments, social service activities, etc. The field assessor states that in his opinion the management expects the men to pay their way. Whether that opinion is correct or not, the place is in fact operated as a hotel where guests are charged for their accommodations and must be construed as such.

While the hotel was built with money raised from donations and the place is designed as a philanthropic institution which at best will be only self-sustaining, we do not believe it can be classed as coming within the precise meaning of any of the words quoted above. Even a liberal interpretation would not make a place of this kind exempt as a charitable institution. In fact, the persons who seek accommodations there would, in most cases, resent an imputation that they are the recipients of charity.

It should be borne in mind that water rates are exacted not as a tax but as payment for water supplied. (Dillon on Mun. Corp., 5th Ed., Sec. 1371 note.) To supply water free amounts to giving a donation. The only way in which the exemption of charitable institutions by this ordinance can be justified is by treating the assessment of water rates as a tax. Such being the case, we are constrained to say that even when limited to institutions which are strictly charitable the City Council has gone as far as the law will permit it to go.

The leading case in this state on the subject of donations by a municipality is *Washingtonian Home v. City of Chicago*, 157 Ill. 414. There the court says (p. 428):

“The revenues of the City of Chicago arising from licenses, from taxation, and from all other sources, are owned by the city and held by it in trust, to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city, or by the City Council, to any person they may think entitled to the same, but, on the other hand, such revenues can only be paid out or appropriated by the City Council or its officers in the manner and for the purposes authorized by law.”

While in the above case there was a payment of money instead of the remission of water rates, the principle announced is the same as in the present instance.

This department has been called upon to pass on similar questions and has consistently held that such charges as inspection fees, water rates, etc., cannot be dispensed with where the institution has not been exempted by the strict letter of the law. Thus, it held that churches must pay inspection fees, that hospitals which do not come within the rule of exemption even though not institutions for profit must pay license fees, that a club operated by women as a social center must pay a dance hall license fee when it sells tickets for certain functions held therein, etc.

We are therefore of the opinion that you would not be justified in remitting the charges for water supplied to this hotel.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Pension of Retired Patrolman.

April 2, 1918.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND

OF THE CITY OF CHICAGO.

Gentlemen:

We beg to acknowledge receipt of your oral request for an interpretation of paragraph A of Section 3 of the amended Police Pension Fund Act of the State of Illinois in force and effect July 1, 1917.

You inform us that the City Council has increased the maximum salary of patrolmen from \$1,320 to \$1,500 per annum—the increase to date from January 1, 1917—and as we understand it, what you desire to be advised on is what amount of a pension a patrolman, who retires from the

department after he receives the increase in salary provided for by the Council, is entitled to receive under the law.

In reply, we beg leave to advise you that Section 3 of the Police Pension Fund Act as amended and in force July 1, 1917, provides, in part, as follows:

“§ 3. Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or regular policeman in any such city, and shall have served for a period of twenty (20) years or more as such policeman on the police force of any such city, or where the combined years of service of such person in the police department and fire department of any such city shall aggregate twenty (20) years or more, in either such case when such person shall have arrived at the age of fifty (50) or more years he may make application to said board for retirement, and said board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension:

“(A) Equal to one-half of the amount of the salary attached to the rank which he may have held in said police force for one year immediately prior to the time of his retirement from the police force:”

The language used in the above section appears plain and cannot be said to be in any way ambiguous. It requires a policeman to serve for one year in a rank before he is entitled to retire on half of the salary payable to officers holding said rank. It does not provide that he must draw any fixed salary for any particular length of time before getting the advantage of the salary upon retiring on a pension. Where a policeman has served for over a year in one of the ranks of the department and the salary payable to said rank is increased by the Council and the policeman desires to retire, he is entitled to receive a pension equal to one-half of the salary for said rank as fixed by the Council even if he should retire one day after the ordinance raising the salary becomes effective.

We, therefore, beg leave to advise you that, under the law, policemen who have held the rank of first-class patrolmen for one year and who have had their salaries raised from \$1,320 to \$1,500 per year and who now desire to retire from

the department either for length of service or for disability, are entitled to receive a pension equal to one-half of the annual salary of \$1,500.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Application of Proceeds of Bonds Issued for General Corporate Purposes.

Chicago, April 3, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have before us your letter of recent date in which you call attention to the fact that a large sum of money derived from the proceeds of bonds issued for general corporate purposes was used for supplies and contract work for the water system, and asking whether the money so used can be recovered for the general corporate fund.

It appears that in the years 1907 and 1908 there were issued and sold \$3,500,000 worth of bonds for general corporate purposes. These were authorized by two ordinances passed respectively September 12, 1907, and March 23, 1908.

Section 1 of the first of these ordinances (Council Journal, Sept. 12, 1907, p. 1565) began as follows:

“That for the purpose of providing funds for the general corporate purposes of the City of Chicago, Illinois, there shall be borrowed on the credit of said city the sum of two million five hundred thousand (\$2,500,000) dollars, and to evidence such loan there is hereby ordered issued the negotiable interest-bearing bonds of said city to said amount. Said bonds shall be designated as ‘General Corporate Purposes’ bonds, shall be two thousand five hundred in number, numbered from 1 to 2,500 inclusive, and of the denomination of one thousand (\$1,000) dollars each, shall bear date of September 16, 1907, and shall become due and payable as follows, to-wit:”

Then follows a schedule and provisions for the payment of interest, etc. Section 2 provides for the registration of the bonds. Section 3 gives the form of the bond, in the body of which is stated, among other things, that "this bond is issued by said city for the purpose of providing funds for the general corporate purposes of said city." Section 4 provides for the signatures of the proper officers, etc. Section 5 provides, among other things, that "said bonds shall be delivered by the city comptroller of said city to the purchasers of the same, and the proceeds derived therefrom shall be used solely for the general corporate purposes of said city." Section 6 provides for the levy of taxes to pay principal and interest, and Section 7 states that the ordinance shall take effect at the time of its passage. Nowhere in the ordinance is there any intimation that any portion of the fund derived from these bonds was to be used for the purposes of the water system.

The other ordinance (Council Journal, March 23, 1908, p. 4591) began as follows:

"That for the purpose of providing the necessary funds wherewith to make public improvements and for the general corporate purposes of the City of Chicago there shall be borrowed on the credit of said city the sum of one million dollars (\$1,000,000), and to evidence such loan there is hereby ordered issued the negotiable interest bearing bonds of the said city to said amount. Said bonds shall be designated as "General Corporate Bonds"; shall be one thousand (1,000) in number, numbered from one (1) to one thousand (1,000) inclusive and of the denomination of one thousand dollars (\$1,000) each; shall bear date of January 1, 1908, and shall become due and payable as follows:"

This ordinance proceeds along the same lines as the first. In the body of the bond, the form being prescribed as in the other ordinance, it is stated that "this bond is issued by said city for the purpose of providing funds wherewith to make public improvements and for the general corporate purposes of the City of Chicago." In Section 5 it is provided that "said bonds shall be delivered by the city comptroller of said city to the purchasers of the same from the City Council, and the proceeds derived therefrom shall be used solely for

making public improvements and for the general corporate purposes of the City of Chicago." As in the case of the first ordinance, there is no provision that indicates that the proceeds were to be used for water purposes.

Your letter states that there were charged against the funds derived from these bonds 56 vouchers for supplies and contract work for the Water Department amounting to \$1,-441,444.24, which amount was subsequently reduced by an adjustment so that the net amount so used was \$1,425,725.14.

The first ordinance authorized the use of \$2,500,000 for general corporate purposes only, and the second authorized the use of \$1,000,000 for public improvements and general corporate purposes. In the light of the decision in *People ex rel. City of Chicago v. Hummel*, 215 Ill. 71, we do not believe it was proper to use the money for the payment of the vouchers in question. That decision had been rendered but a short time before that (April 17, 1905) and it drew a sharp distinction between the water fund and the fund for general corporate purposes, and held that they must be kept separate.

Prior to the adoption of the Cities and Villages Act the city was operating under a series of legislative enactments of which the ground work or underlying act was the so-called consolidated charter act of February 13, 1863. This act was amended from time to time, and in one or two instances there were added separate enactments. All of these acts were collected in 1873 by the late Judge Tuley, who was then corporation counsel, in a volume entitled "Laws and Ordinances Governing the City of Chicago," to which we shall refer in this opinion.

The important feature of this former charter, so far as the question before us is concerned, was that the water system and the handling and disposition of the water fund was under the control of a board of public works, and the fund for general corporate purposes was directly under the control of the Common Council. In order to raise money for the purposes of the water system the Board of Public Works, sometimes with and sometimes without the approval of the Common Council, could issue bonds. (Tuley, Ch. 15, pp. 523-

531.) So far as the handling of the funds was concerned, the board was independent of the Common Council.

To be more specific, under Section 12 of the Act of February 13, 1863 (Tuley, 525), the board had power, without the concurrence of the Common Council to issue all bonds authorized under the Act of February 15, 1851, incorporating the Chicago City Hydraulic Company, and under Sections 13 and 14 to issue, with the approval of the Common Council, \$500,000 worth of bonds for expenditures authorized in Chapter 15 of that act. By the Act of October 5, 1863, the board was authorized, without concurrence of the Common Council, to issue \$375,000 worth of bonds for a lake inlet (Tuley, 356-7), by the Act of July 24, 1865, to issue \$200,000 worth of bonds for a new engine (Tuley, 366), by the Act of March 9, 1868, to issue \$200,000 worth of bonds to extend distributing mains (Tuley, 367), by the Act of September 10, 1869, to issue \$200,000 worth of bonds for the erection of engines (Tuley, 367), and by the Act of June 6, 1870, to issue \$1,300,000 worth of bonds for the extension of the water works (Tuley, 368). By the Act of March 10, 1869, the board, with the concurrence of the Common Council, was authorized to issue \$2,000,000 worth of bonds for the increase and extension of the water system (Tuley, 427). By the Act of March 9, 1867, the city was given power to issue \$1,000,000 worth of water bonds, but it was specifically provided that the custody and disbursement of the proceeds should be the same as provided for in Chapter 15, so that these bonds were also to be issued on the initiative of the board, with the concurrence of the City Council (Tuley, 531).

Section 13 of Chapter 15 of the Act of 1863 (Tuley, 525) provided as follows:

“All funds derived from the sale of said water loan bonds, or from water rents, or otherwise, for the water works of said city, shall be exclusively used and appropriated by said board, to the objects and purposes pertaining to the water supply of said city, herein specified, nor shall the same, or any part thereof, be used by the said board, or by the said city, for any other purpose.”

Section 32 of the same chapter (Tuley, 530), reads as follows:

“All accounts pertaining to the water works of said city shall be kept separate and distinct from the accounts pertaining to other departments of said board; and all moneys deposited with the city treasurer on account of the water works shall be by him kept separate and distinct from all other moneys, as the water fund, and shall only be applied for the uses and purposes for which the same were received; and such moneys shall be held by the treasurer of the city as a special fund, separate and distinct from other funds; and he shall be deemed guilty of embezzlement if he shall pay out such moneys for any account other than that belonging to such water fund, and shall be liable to indictment for so doing.”

It will thus be seen that the Legislature left nothing undone to make the water system finances as separate and distinct from the general corporate fund as was possible.

The Legislature was equally specific in regard to other funds in the charter of 1863 and the amendments thereto. Thus, it provided for a tax of $4\frac{1}{2}$ mills on the dollar “to defray the contingent and other expenses of the city, not herein otherwise specially provided for, which taxes shall constitute the general fund.” Then followed an enumeration of other taxes authorized (Tuley, 471). Among the taxes authorized were taxes for a reform school, for street lighting, for sewerage debt, for water loan bonds, for city hall, for schools, for police expenses, etc.

Again, under Section 7 of Chapter 5 (Tuley, 416), the comptroller is required to pay money on warrants drawn on the particular fund to which it is chargeable, and under Section 13 of the same chapter there is a like provision which is equally specific (Tuley, 418). Under Section 41 of Chapter 5 (Tuley, 425), the comptroller, with the sanction of the mayor and the finance committee, was given authority to meet deficiencies by drawing from one fund to another, except the water fund, the school tax fund and the special assessment fund, if provision for reimbursement was made.

Other parts of the former charter could be quoted to show that there was to be no transferring or intermingling of funds so far as the water fund was concerned, but we deem it necessary to point to only one more section to establish our

point that under the old charter the water fund was not to participate in the funds raised for general corporate purposes. Section 9 of Chapter 6, the chapter which established and defined the duties and powers of the Board of Public Works, reads as follows (Tuley, 431) :

“The office expenses, and the expenses for clerks, engineers and assistants, and the salaries of said commissioners of the board of public works and their officers, shall be a charge, and shall be paid, share and share alike, out of the funds pertaining to the general fund of said city, and the funds pertaining to the water and sewerage works of said city; each of said funds to bear one-third of said expense.”

The above conclusively demonstrates that, so far as the old charter is concerned, there was no authority vested in either the Common Council or any other officer of the city to use general corporate funds for water purposes or to use water funds for general corporate purposes.

When the Cities and Villages Act was adopted the Board of Public Works went out of existence, and its powers were vested in the City Council, except in so far as the commissioner of public works was authorized to act instead of the board by virtue of ordinances designating him as the person to act where former statutes that were not repealed required action by such a board.

For a long time it was assumed that the new law had established a change in the status of the various funds created under the old charter, although this presumption never extended so far as to include the use of the water fund for general corporate purposes. It was finally determined, however, to make use of certain money in the water fund for general corporate purposes, with the result that the Supreme Court held that the provisions of the former charter separating the water fund from the general corporate fund were still in force.

On November 21, 1904, the City Council passed an ordinance which, after reciting that a sum of \$650,000 derived from water rents and other earnings of the water works in the water fund was exclusive of all current and existing liabil-

ities, directed the city treasurer to transfer said sum to the corporate fund of the city. The treasurer refused. A writ of mandamus was applied for in an original proceeding filed in the Supreme Court.

The court held that the portion of the Charter of 1863 which provided for the keeping of revenues derived from water rents and other sources of income of the water system in a separate fund, not to be intermingled with other city funds, was still in force.

Among other things, it said:

“The City and Village Act of 1872 contains no express limitation upon the use of money derived from the water works of the city, but we are unable to find any provision in the latter enactment inconsistent with the limitations placed upon the use and disposition of that fund by the express provisions of said Sections 13 and 32 of the charter of 1863. The charter of 1863 created a board of public works of the city, and invested that board with the charge and superintendence of the water works of the city, and with power to assess water rates and make regulations, etc. The general act of 1872 places the water works in the charge and superintendence of the city council, and gives to the council the power to fix water rates and make regulations, etc. Under the former charter the board of public works possessed certain powers with reference to procuring loans of money to be used for the water works, which powers are vested by the later general enactment in the city council. But these differences in the two enactments have no relation to the duty of the treasurer of the city in the care and custody of the funds arising from the operation of the water works. The provision of the general act of 1872 investing the city council with power to control ‘the finances and property of the corporation’ does not, by any rule of construction of which we are advised, contravene those provisions of sections 13 and 32 of the charter of 1863 forbidding the use or appropriation of the water fund to objects and purposes other than those for which the same was collected by the city from the consumers of water. The general power of control of the finances and property of the municipality must be vested in some body or official, and the power thus given is not unrestrained authority to control the property or revenue according to the personal inclination of the authorities, or even according to their

personal judgment, but to apply, control and dispose of the municipal finances and property in accordance with law. The power given is merely authority to legally administer the finances and property of the city.''

People ex rel. City of Chicago v. Hummel, 215 Ill. 71.

The decision of the Supreme Court preserves the distinction which we have pointed out between the water fund and other city funds. It is not to be assumed that the court will hold differently with regard to the transfer of funds from the general corporate fund to the water fund. If it is wrong to transfer from the water fund to the general corporate fund, then it must be equally wrong to transfer from the general corporate fund to the water fund.

It would serve no useful purpose to dwell on the intention of the Legislature when it enacted laws which prohibited the use of the water fund for any except water purposes. Probably the chief reason for such restriction was that it was designed to make it impossible to levy an indirect tax on the people for general corporate purposes through the medium of excessive water rates. If that is correct, then there is an equally cogent reason for prohibiting the use of money contributed by the general public for the purpose of reducing water rates, since the principal beneficiaries would be the large users of water who would profit at the expense of the general public.

We are therefore at a loss to see under what theory the proceeds of bonds issued for general corporate purposes and for public improvements were used to defray the expenses of the water system. Moreover, we have searched the records of the City Council diligently to find the authority under which the payments were made, and we find absolutely no ordinance or order under which the executive officers of the city could claim authority to divert the money from general corporate purposes to the purposes of the water fund. So far as we have been able to ascertain there was no such authority, and the payments were not lawfully made from the proceeds of these bonds. It was clearly the intention of the City Council, when it passed the ordinances in question, to provide money

for the purposes mentioned in the ordinances and not for the water fund.

If anything were needed to convince us that there was no intention on the part of the City Council to apply these bonds on account of expenses of the water system, it would be found in the fact that the same City Council which authorized these bonds also authorized two issues of bonds in the shape of water certificates aggregating \$1,500,000. (See Council Journal, May 6, 1907, p. 151, and Council Journal, October 7, 1907, pp. 1716-17.) These water certificates were intended for the purposes of the water fund, and it is a fair presumption that if the same City Council had intended that another \$1,400,000 should be used for the same purpose it would have authorized another issue.

Inasmuch as the sum mentioned (\$1,425,725.14) was unlawfully diverted from the general corporate fund to the water fund it is entirely proper to reimburse the general corporate fund for that amount from the water fund. The mere lapse of time does not operate to deprive the city of that right. There is no statute of limitations which bars the city from adjusting its accounts in this way.

Our recommendation is that steps be immediately taken to make such transfers as may be necessary to restore the money. So far as the details are concerned, they can be readily determined upon by the city's accountants. We do not consider it absolutely essential to secure council action in order to make this readjustment of the city's accounts, but owing to the large amount involved and the fact that the matter has been allowed to rest so long, it may be well to submit your plans for making such transfer of funds to the City Council.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Liability of City on Vacation of Alley.

April 9, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your communication in reference to the proposed ordinance now pending for vacation of the south end of the north and south alley in the block bounded by Michigan avenue, Wabash avenue, 14th and 16th streets, and dedication in lieu thereof of a parcel of land fronting on Wabash avenue immediately south of and parallel with the St. Charles Air Line and running from Wabash avenue to the west line of the north and south alley, has been received.

This proposed strip is 18 feet wide and is to take the place of the portion of the alley proposed to be vacated.

You ask to be advised if the owners of the property north of the St. Charles Air Line will have any legal claims for damages against the city if said ordinance is passed. This alley, part of which it is proposed to vacate, now runs from 14th street on the north to 16th street on the south and 14th and 16th streets are the only outlets from said alley. The alley is 18 feet wide from 16th street to a point approximately 305 feet south of 14th street and from this point to 14th street is 20 feet wide. 14th street is a 50 foot street and is the north entrance to this alley. 16th street is also 50 feet wide and is the south entrance of said alley.

The portion of said alley proposed to be vacated extends north from the north line of East 16th street, a distance of 143.75 feet and is shown by the plat attached to the ordinance and colored in red and indicated by the words "to be vacated."

The plot to be dedicated for an alley in lieu of the vacated portion is 18 feet wide and extends from a point 143.75 feet north of the north line of East 16th street to the south wall of the St. Charles Air Line and runs parallel with said air line from the west line of the present alley to Wabash avenue on the west. This 18 foot strip to be dedicated is to take the place of the present entrance to the south end of the

alley extended to 16th street. All vehicles entering said alley from the south will come in from Wabash avenue over this proposed strip (to be dedicated) and will turn north into the portion of the alley north of the strip vacated.

In the determination of the question of liability two sources of damage might be claimed.

1st: The property owners north of the St. Charles Air Line might claim that they were injured because of the closing of the south end of said alley.

2nd: That the means of ingress to and egress from the premises abutting on this alley north of the St. Charles Air Line is impaired by reason of this proposed vacation.

In passing on a case similar to the one here in question, the Supreme Court of Illinois in *Inez L. Parker v. The Catholic Bishop of Chicago, et al.*, 146 Ill. 158, at page 165, said:

“It is insisted and alleged in the bill, that the vacation of the alley deprived the complainant of a valuable property right, which she would otherwise enjoy as appurtenant to her lots and that if said alley was vacated for a public use or purpose it damaged her property, and she was therefore entitled to compensation. While private property can not be taken by public authority for private use, it may be taken or damaged for a public use upon payment of just compensation to be ascertained by a jury in the mode prescribed by law. (Const., Sec. 13, Art 2.) It seems to be well settled in this state, that where no part of the land or property of the complaining owner is physically taken for or in making the proposed public improvement, and the damages claimed to result are therefore consequential, only, this provision of the Constitution does not require the ascertainment and payment of such damages as a condition precedent to the exercise of the right or power. *Stetson v. Chicago and Evanston Railroad Co.*, 75 Ill. 76; *Patterson v. Chicago, Danville and Vincennes Railroad Co.*, *id.* 588; *Schertz v. Peoria and Rock Island Railroad Co.*, 84 *id.* 135; *Pennsylvania Mutual Life Ins. Co., et al. v. Heiss, et al.*, 141 *id.* 35. * * * The presumption is, that the City Council, being clothed with governmental functions, will discharge its duty as required by law, and that where property is damaged by the proposed vacation or closing of any of the streets or alleys of the city, they will ascertain and pay the damages as required,—and this pre-

sumption will obtain until the property owner has, in an appropriate action, established his right to damages, and the property owner will, where no proceedings have been instituted by the municipality to ascertain his damages, be remitted to his remedy at law for recovery of the same. The determination of the city authorities can not, however, be conclusive upon the property owner. He will be entitled to his day in court, to recover, in an appropriate action at law, all such special damages to his property, as contradistinguished from damages he suffers in common with the public, as will be occasioned by the proposed vacation. *Chicago v. Union Building Assn.*, 102 Ill. 379; *East St. Louis v. O'Flynn*, 119 *id.* 200, and cases *supra*; *Rigney v. Chicago*, 102 *id.* 64; *McDonald v. English*, 85 *id.* 236.

"Moreover, while the bill alleges that the complainant had an easement in the alley vacated, there are no allegations showing special damages or injury peculiar to her lots, or that are, in kind, different from those sustained by the general public. Such special injury, or damages differing in kind from those affecting the general public are the gist of the right of private action, and, to give the complainant any standing, either in equity or at law, must be alleged and shown. It is apparent, we think, taking the allegations of the bill as true, as must be done, the damages resulting to complainant are of the same kind, as those sustained by the general public, and differ only in degree, as the convenience afforded by use of the alley would be greater or less to her than to others of the general public. (*McDonald v. English, supra*; *East St. Louis v. O'Flynn, supra*; *Chicago v. Union Building Assn., supra*; and cases cited on page 393.) Complainant is not deprived of access to the rear of her lots, but is inconvenienced, doubtless, by having to go a few feet further to gain access thereto from the adjacent street. But, as said in the *O'Flynn* case, *supra*, that "is the 'same kind' of damage that will be sustained, by all other persons in the city that might have occasion to go that way, and although the inconvenience he may suffer may be greater in degree than to any other person, that fact would not give him a right of action."

In the case of *Parker v. Catholic Bishop, supra*, the complainant purchased two lots on Washington street which abutted on an alley. This alley had two outlets, one to Oakley

street and the other to the north into an east and west alley which led to Oakley street.

By an ordinance passed by the City Council of the City of Chicago, the alley leading directly into Oakley street was vacated on condition that the alley running north would be widened to 18 feet. The court held in this case that no damage was sustained by reason of the vacation because the ingress to and egress from the premises of the complainant was not impaired.

The doctrine that no action will lie for vacating streets and alleys simply because the vacating "injuriously affects" the plaintiff's property has been sustained in the case of *City of East St. Louis v. James O'Flynn*, 119 Ill. 379; *Rigney v. City of Chicago*, 102 Ill. 64. In the case of *Parker v. Catholic Bishop, supra*; *Chicago v. Union Building Assn.*, 102 Ill. 379, and in *City v. Burcky*, 158 Ill. 102, it was held that the right of the owner in adjoining streets and alleys is the mere right of access.

It is evident from the decisions hereinbefore quoted that the only damage for which the city would be liable is the impairing of the right of ingress to and egress from the premises north of the St. Charles Air Line. In this proposed vacation ordinance the only difference in the proposed new alley is that the turning space at the junction of the north and south alley is reduced on the south end from 50 feet, the width of 16th street, to 18 feet, the width of the proposed alley. Whether this change will affect the access to or egress from the lots north of the St. Charles Air Line is a question of fact which would have to be determined by investigation. The rules of law applicable to this situation are set forth hereinbefore and if any damage is sustained by any of the property owners in this block between 14th and 16th streets in the alley north of the St. Charles Air Line by the impairment of the rights of ingress and egress to the property abutting on said alley allowed by this ordinance, the city will be liable.

If you will pardon the suggestion, permit us to say that the question of vacating an alley is one for the City Council,

and, ordinarily, that body refers such matters to the Compensation Bureau for the purpose of ascertaining what, if any, damage the city is apt to sustain, and what, if any, compensation the city should receive on account of the proposed vacation.

Very truly yours,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Lien Notice to Comptroller.

April 10, 1918.

HON. EUGENE R. PIKE, Comptroller.

Dear Sir:

Your request for an opinion under date of April 10, 1918, enclosing copy of lien notice filed in your office April 1, 1918, by Harry Hawkins (for services performed on city contract), against O. P. Chamberlain, who has a contract for special assessment work in which you inquired if the lien attaches to the particular voucher No. 4626 issued under warrant No. 44887, for the sum of \$300, delivered to O. P. Chamberlain, November 6, 1916, has been received.

We carefully note what you state and beg to say that in our opinion the voucher referred to having been issued and delivered to the contractor on November 16, 1916, both the issuance and delivery taking place before April 1, 1918, the date of the notice of lien, is therefore not subject to lien; and in support of our opinion we refer to the provision of Section 23 of "An Act to amend an act entitled, 'An Act to revise the law in relation to mechanics' liens. To whom, what for, and when lien is given; who is a contractor; area covered by and extent of lien; when the lien attaches,' approved May 18, 1903, in force July 1, 1903, as amended," passed June 28, 1917, in force July 1, 1917. (Page 566, Sessions Laws of Illinois, 1917.)

“§23. Any person who shall furnish material, apparatus, fixtures, machinery, or labor to any contractor having a contract for a public improvement in this state, shall have a lien on the money, bonds or warrants due or to become due such contractor under such contract: *Provided*, such person shall, before payment or delivery thereof is made to such contractor, notify the official or officials of the state, county, township, school district, city or municipality whose duty it is to pay such contractor of his claim by a written notice; *and provided further, that such lien shall attach only to that portion of such money, bonds or warrants against which no voucher or other evidence of indebtedness has been issued and delivered to the contractor by or on behalf of the state, county, township, school district, city or municipality as the case may be at the time of such notice.* It shall be the duty of any such official so notified to withhold a sufficient amount to pay such claim until the same is admitted by the contractor, or adjusted by the agreement of the parties, or there has been an adjudication of same in a court of competent jurisdiction, and thereupon to pay the amount so determined to be due such claimant, if any, and to that end the said state, county, township, school district, city or municipality or any of the other parties interested may institute suit in the same manner as provided herein in case of privately owned real estate to determine the rights of the parties when such claim is filed. Any payment so made to such claimant shall be a credit on the contract price to be paid to such contractor. Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the claimant serving such notice for the damages resulting from such violation, which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts.”

Yours very truly,

EDWARD J. SMEJKAL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Proposition to Levy Poll Tax.

April 12, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

You forwarded to this department a letter addressed to you from Mr. Nathan Reid, 6928 Aberdeen street, Chicago, in which he makes some suggestions in regard to taxation.

The gist of Mr. Reid's letter is to the effect that he believes it would be proper for the city to levy a poll tax. This has been spoken of many times, and in some cases it has been brought to the attention of the City Council. No poll tax has been levied in the City of Chicago for many years, and we are not certain whether one has ever been exacted.

The Constitution of 1870 directs that the General Assembly shall provide for the levy of a property tax and that has been generally accepted as the proper tax to be levied for all state, county and municipal purposes. There is, however, no direct inhibition against the levying of a poll tax in the constitution, therefore such a tax would be constitutional if it was deemed advisable to impose such a tax. There are now such taxes imposed for road purposes outside of cities, villages and incorporated towns. Such a tax will also be valid if levied in the city, the only restriction on it being that this tax, the same as all other taxes, must be uniform with respect to persons and property within the jurisdiction of the body imposing the same.

We call your attention to Section 10 of Article V of the Cities and Villages Act which defines the right of the city with regard to such a tax at the present time. Same reads as follows:

“§ 10. The city or village government shall have jurisdiction upon all waters within or bordering on the same, to the extent of three miles beyond the limits of the city or village, but not to exceed the limits of the state; and may, by ordinance, require every able-bodied male inhabitant, of such city or village, above the age of twenty-one years and under the age of fifty years (excepting paupers, idiots, lunatics, and such others as are

exempt by law), to labor on the streets and alleys of such city or village, not more than three days in each year, but such ordinance shall provide for commutation of such labor at not more than one dollar and fifty cents per day."

It will be observed from the above that the city has now, without any further action on the part of the General Assembly, the power to require service on the streets and alleys, provided that in case an ordinance is passed to that effect it shall permit a commutation of the labor required by the payment of money in place of same. In case such an ordinance is passed, it is probable that a large part of the labor thus imposed on the male inhabitants of the city will be avoided by the payment of the money, and revenue will in that way be secured.

In case the City Council sees fit to enforce a requirement of this kind we will prepare an ordinance to that end.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Permits for Construction Work on Intercepting Sewer.

April 12, 1918.

HON. FELIX S. MITCHELL, Superintendent of Streets.

Dear Sir:

We are in receipt of your letter, dated February 1st, in which you request an opinion as to whether, in the construction of the Calumet Intercepting Sewer by the Sanitary District of Chicago, under the authority of an ordinance passed by the City Council on July 12, 1915 (Council Proceedings, page 1211), the Department of Public Works may impose the usual charge for inspection of the work by city inspectors.

You state that the contention is made by the Sanitary District that under Section 9 of the ordinance, above mentioned, such a charge should not be made. Section 9 reads as follows:

“Section 9. That the commissioner of public works is hereby authorized and directed to issue, without fees or cost therefor, to The Sanitary District of Chicago or to any contractor to whom the work or any part thereof specified in this ordinance shall be awarded, all permits or licenses required for doing said work, and shall not require of the Sanitary District the deposit of any sum of money now required under the ordinances of the City of Chicago for similar work.”

The only requirement made by the ordinances of the city with respect to the deposit of money at the time of securing permits authorizing the opening of any street is contained in Section 2446 of The Chicago Code of 1911, which is as follows:

“2446. PERMITS FOR OPENING STREETS, ETC.). Before a permit shall be granted to any person or corporation to open any street, sidewalk, alley, avenue or public place, for any purpose, an estimate of the cost of restoring the said street, sidewalk, alley, avenue or public place to a condition equally as good as before it shall have been so opened, with a fair additional sum as margin for contingent damages, shall be made by the commissioner of public works, and the permit shall be issued and transmitted to the city collector for collection of the deposit and fee and delivery of the permit.”

It will be observed that this section does not require a deposit of money for the payment of inspectors' fees, but merely a sum representing the cost of restoring the street to its original condition, together with an allowance for contingent damages.

Section 2448 of The Chicago Code of 1911 provides that all work done under the authority of permits issued by the commissioner of public works “shall be supervised and inspected by a city inspector to be designated by such commissioner, and such supervision and inspection shall be done

at the sole expense of the person or corporation securing such permit."

We are of the opinion that it was not the purpose of Section 9 of the ordinance of July 12, 1915, to require the city to render the inspection service specified by the above ordinance without reimbursement, nor was the obligation of the Department of Public Works to render such service removed. The responsibility for the safe condition of the streets rests upon the city, and the above ordinance does not attempt to relieve the city of that responsibility. The Sanitary District under the ordinance in question assumes to indemnify the city for any damages growing out of the construction, reconstruction, maintenance, repair and operation of the intercepting sewer, but when the work of construction, reconstruction or repair is completed and the pavement is relaid, the Sanitary District will not be accountable for the condition of the street, the city alone will be charged with any defects that may exist. It is necessary, therefore, that there should be city inspection of the work done by the Sanitary District, just as in every case where permits are issued for the opening of the streets, and if that inspection service is rendered, the city is entitled to payment therefor.

The ordinance of July 12, 1915, relieves the Sanitary District of the necessity of paying for the permits issued for the work therein authorized, and of depositing with the city collector large sums of money to cover the cost of restoration of the pavement which is torn up, but it does not sustain the contention of the Sanitary District that it is also relieved of the obligation to pay the usual fees to the city for the work of inspection performed by the city inspectors.

Yours very truly,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Examination of Mason Contractors.

April 22, 1918.

CHARLES C. STEWART, ESQ., Chairman, Board of Examiners of
Mason Contractors.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether a mason contractor who underwent an examination and received a license as such under the ordinance of the city as it was before the recent amendment should be required to undergo another examination for the purpose of determining his qualifications and competency in any of the recognized branches of the business.

The only part of the ordinance which we need quote for the purposes of this opinion is the first sentence of Section 5, which reads as follows:

“Said board of examiners of mason contractors shall examine such applicants as to their practical knowledge *of any or all of the recognized branches of masonry and mason work* and of matters pertaining to mason construction and, if satisfied of the competency of any such applicant, shall thereupon issue a license to such applicant, authorizing him to engage in the business of mason contracting or employing mason *in any or in all its recognized branches*, as the case may be.”

In the above quotation we have italicized the words which were inserted when the ordinance was amended. The gist of the amendment is that the ordinance now contemplates that before a person shall be given a license to do all kinds of mason work the board must be satisfied that he is competent to do the work in all the different branches of the trade, and in case he is competent to carry on the work in one or more of the recognized branches of the trade and not in the others he is to receive a license for operating only in that branch of the trade in which he has shown his proficiency.

Before the ordinance was amended an applicant for a license was required to pass an examination in order to show his competency in general. It must be assumed that the ex-

aminations heretofore conducted disclosed whether an applicant was competent in at least one of the recognized branches of the trade—otherwise he would not have been licensed to do mason work generally. Such being the case, it is for the board of examiners to say whether or not such examination was sufficient to test the ability of the applicant in all the different branches of the trade. The Department of Law can be of little assistance in determining that question.

If the examinations you have held were of such a character that you could determine an applicant's ability in only one branch of the business, then before you issue a new license for any person who took such examination to operate in *all* the recognized branches of masonry it would be necessary to re-examine him in order to determine his fitness in the other branches. The same is true as to two or more branches. But there would be no occasion for requiring another examination to determine whether a person who is operating under a license is competent in the particular line for which you examined him before.

To illustrate our point, we will assume that your examination in the first instance was such as to test an applicant's ability in the work of constructing brick work on buildings. Although you issued a general license to a successful applicant under the ordinance as it then stood, it would not now be proper for you to issue a new license to him authorizing him to engage in any and all classes of masonry work, or even to engage in brick work and stone work (assuming that the qualifications for doing stone masonry on buildings are different) or to engage in building work and sewer work; but on the other hand it would be entirely unnecessary for you to call him in for another examination as to his competency to do brick work on buildings.

If the examination was such as to test an applicant's ability in all branches, then of course there would be no need of re-examining him.

Summing up, therefore, we would say that if your record of an examination shows that you examined a person as to his ability to do work in a particular branch of the trade you

need not re-examine him before giving him a new license for doing that class of work, but you should re-examine him if he wants to get a license for other classes of work; if your record shows that he was competent in two or more branches he will be entitled to a new license covering those branches without re-examination; and if the record shows that he was proficient in all branches he would be entitled to a new license for all branches without re-examination. If your record does not show these things, however, but only shows a general examination, then you can only issue a license without re-examination to do that class of work which is clearly within the general examination that you made.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Street Repair Employees.

April 24, 1918.

HON. CHARLES E. FRAZIER, President, Civil Service Commission.

Dear Sir:

Pursuant to your verbal request to be advised concerning the civil service status of the several persons examined, certified and appointed to the position now designated as "street repair foreman" and classified in Class K, Grade II, by reason of having attained the required general average standing at an examination for the position then designated as "Foreman street repairs," held on June 28, 1913, pursuant to an order of the Civil Service Commission, as shown in the minutes thereof on pages 286, 287, of the annual report of the Civil Service Commission for the year 1913, which read in part as follows:

"Examinations Ordered."

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"Foreman street repairs, Class L, Branch b, orig., June 28."

I would say it appears that the position of "Foreman of Street Repairs," for which the above mentioned examination was ordered and held on June 28, 1913, and the position now designated as "Street repair foreman" and classified in Class K, Grade II, is in fact one and the same position.

It further appears from the records of the Civil Service Commission that the following orders were made and entered of record, and procedure taken, with respect to such position of "Foreman of Street Repairs," as shown in the minutes of the Civil Service Commission for the several dates, and on the several pages of the annual report of the Civil Service Commission for the year 1913, as follows:

"May 5, 1913, pages 257, 258.

"Examinations, * * * Ordered. * * * Foreman Street repairs, Class K, Grade III, orig., May 27."

"May 9, 1913. Page 264.

"Ordered, that the following newly created positions be and the same are hereby classified as follows:

* Title	* Class	* Grade
* "Foreman of Street Repairs—K	* III."	* "

"May 21, 1913. Page 273.

"Examinations, Canceled: Foreman of street repairs, Class K, Grade III, heretofore advertised for May 27."

* * *
 "Ordered, that the position of foreman of street repairs, classified on May 9, 1913, in Class K, Grade III, be and the same is hereby classified in Class L, Branch b, the duties and responsibilities of the position being of such a nature as to warrant this reclassification."

"June 6, 1913. Pages 286, 287.

"Examinations Ordered.

* * *
 "Foreman street repairs, Class L, Branch b, orig., June 28."

"June 30, 1913. Page 307.

"Eligible Lists.

* * *
 Posted: Foreman street repairs, Class L, Branch b, orig., exam. No. 2205, held June 28."

December 1, 1913. Page 440.

"It appearing that the duties of the position of foreman of street repairs are of a character and responsibility

requiring special qualifications and requirements, it is, therefore, Ordered, that the position of foreman of street repairs, now classified in Branch b, laborer service (Class L), be and the same is hereby reclassified in Grade II of the skilled labor service (Class K, Grade II).''

It is clearly apparent that the examination on June 28, 1913, for such position of foreman of street repairs, was an examination, for a position then classified and included in Class L, Branch b, labor service; and in consequence thereof the civil service rights and protection which a person would acquire by reason of having passed such examination, are such, and such only, as apply to a position classified in such Class L, Branch b, labor service.

While it appears that thereafter on December 1, 1913, such position was reclassified in Class K, Grade II, skilled labor service, I am of the firm opinion that such reclassification would not operate to confer any different and greater rights and protection upon any person whose right of certification and appointment to such position of foreman of street repairs is based upon the result of the examination of June 28, 1913, for such position. If the Civil Service Commission has the power and authority to reclassify a position then classified in Class L, labor service, and classify such position in Class K, skilled labor service, and thereby legally confer upon any civil service incumbent of such position, other and greater civil service rights and protection than any such incumbent had acquired by reason of his examination, certification and appointment to such position, the obverse of any such proposition would imply that the commission has the power and authority to reclassify a position then classified in Class C, clerical service, and classify such position in Class L, labor service, and thereby defeat the civil service incumbent of such position of certain civil service rights and protection which such incumbent had then acquired by reason of his examination, certification and appointment to such position, pursuant to the provisions of the Civil Service Law. But that the Civil Service Commission is not authorized to thus change the status and rights which a person has acquired by reason of his examination, certification and appointment

pursuant to the provisions of the Civil Service Law is too obvious to merit an elaborate discussion of the subject.

On the other hand, one of the main purposes—perhaps the main purpose—of the Civil Service Law is to insure that positions in the public service shall be filled by persons ascertained by proper examinations to be competent and qualified to fill the same. It is obvious that such purpose of the Civil Service Law might easily be defeated if the Civil Service Commission could by means of reclassification advance employes from inferior positions to higher positions; that is to say, the law contemplates that an applicant for such inferior position shall be subjected to an examination for the purpose of ascertaining his ability and qualifications to fill such position; and if by means of a reclassification he could without further examination be advanced to a higher position the result would be that such higher positions would be filled by persons whose ability and qualifications to fill the same had never been ascertained by such an examination as the law contemplates, and who would in fact not have the ability and qualifications necessary to fill such higher positions. For this reason as well as for other obvious reasons which we have mentioned and could mention, it seems to us that the Civil Service Law cannot be construed so as to authorize the commission to hold an examination for employes of inferior qualifications and then, under the guise of a reclassification, advance them to superior positions requiring greater qualifications for which such employes are not required to take any examination.

Inasmuch as it appears from the records of the Civil Service Commission, that the position now entitled street repair foreman, is in fact and in law the position formerly entitled foreman of street repairs, and for which such examination was held on June 28, 1913, I am of the opinion that the civil service status of any person certified and appointed to such position of foreman of street repairs, now entitled street repair foreman, whose certification and appointment to such position is based upon the result of the examination held on June 28, 1913, for such position of foreman of street repairs, is that of a laborer in Class L, Branch b, labor service ;

and any such incumbent of such position of street repair foreman can be removed from the service of the city at any time pursuant to the provisions of the Civil Service Law applicable to the removal or discharge of a laborer.

Respectfully yours,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Special Assessment on Property of Municipal Tuberculosis Sanitarium.

April 29, 1918.

HON. JOHN DILL ROBERTSON, Prés., Municipal Tuberculosis Sanitarium.

Dear Sir:

I return herewith the statement of claim of the City of Chicago, Department of Finance, for special assessment levied upon the property known as 4319 Indiana avenue, the title to which stands in the name of the City of Chicago but which was purchased with the funds of the Municipal Tuberculosis Sanitarium.

I have investigated this claim and find the assessments levied against said property are for local improvements, and that upon the payment of same it does not go into the corporate fund, but goes to redeem bonds or warrants issued to the contractor for said improvements.

You wish to be advised whether or not the Municipal Tuberculosis Sanitarium is liable for a claim of this character.

The act creating the Municipal Tuberculosis Sanitarium provides in part as follows (Laws of Illinois, 1917, pp. 288 and 289):

“§ 6. Said directors shall, immediately after appointment, meet and organize by the election of one of their number president and one as secretary and by the election of such other officers as they may deem necessary. They shall make and adopt such by-laws, rules and regu-

lations for their own guidance and for the government of the sanitarium and the branches, dispensaries and auxiliary institutions and activities connected therewith as may be expedient, not inconsistent with this act and the ordinances of such city or village.' They shall have the exclusive control of the expenditure of all moneys collected to the credit of the tuberculosis sanitarium fund and of the construction of any sanitarium building or other buildings necessary for its branches, dispensaries and other auxiliary institutions and activities in connection with said institution, and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased or set apart for that purpose: *Provided*, that all moneys received for such sanitarium shall be deposited in the treasury of said village or city to the credit of the tuberculosis sanitarium fund, and shall not be used for any other purpose and shall be drawn upon by the proper officer of said city or village upon the properly authenticated vouchers of the sanitarium board. Said board shall have the power to purchase or lease ground within or without the limits of such city or village, and to occupy, lease or erect an appropriate building or buildings for the use of said sanitarium, branches, dispensaries and other auxiliary institutions and activities connected therewith, by and with the approval of the city council or board of trustees as the case may be; and shall have the power to appoint suitable superintendents or matrons or both and all necessary assistants and other employes and fix their compensation, and shall also have the power to remove such appointees, and shall in general carry out the spirit and intent of this act in establishing and maintaining a public sanitarium, and one or all of said directors shall visit and examine said sanitarium at least twice in each month and make monthly reports of its condition to the city council or board of trustees, as the case may be. * * *

The power of the directors of the Municipal Tuberculosis Sanitarium are similar to the power vested in the Board of Education under the old act. They had control of the property devoted to school uses, but could not convey or purchase the property without the consent of the City Council.

In the case of *City of Chicago in Trust for the Use of Schools v. City of Chicago*, 207 Ill. 37, wherein the City of Chicago sought to assess the Board of Education for the

improvement of California avenue, the Supreme Court sustained the right of the city to levy such an assessment, and the court, speaking through Mr. Justice Wilkin, p. 45, says:

“It is also insisted by appellant that the payment of this special assessment out of the school funds would be a diverting of said funds from the object for which they were created. We do not see how that position can be maintained. A special assessment may be levied for the purpose of paving streets, putting down sidewalks, putting in curbing, or for sewer purposes, all of which are, in theory, for the benefit of the property abutting on the line of the improvement. Undeniably all of these improvements are of great benefit, if not of actual necessity, to a public school, and from the most of them no property derives more benefit than does that of the board of education. They are as necessary to the practical use of the property as the furnishing of heat, light and air. Special assessment for such improvements is but a method of applying the funds of the school district for the benefit of its schools, and is legal and proper.”

This special assessment is for the paving of Indiana avenue and unquestionably is beneficial to the property of the sanitarium. The street will be more sanitary and the building will be more accessible for vehicles delivering goods and carrying people to this property. We believe that inasmuch as the right of the City of Chicago to levy special assessments against the property used by the Board of Education having been judicially determined, it would necessarily follow that the city should levy special assessments against the property used by the Municipal Tuberculosis Sanitarium, where the Municipal Tuberculosis Sanitarium derives the benefit from the improvement to be constructed, or which has been constructed.

Very truly yours,

ARTHUR B. McCOID,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Frontage Consent for Garages.

April 30, 1918.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your communication in reference to the application for a garage license made by Benjamin J. Kaufman, 2225 West Harrison street. This location is within one hundred feet of Irving avenue, a residence street, and the Police Department required the applicant to obtain the frontage consents on said street, which he did. You state that these frontage consents were referred to the Building Department by you to be verified, but that the building commissioner returned the consents with the following reply:

“Replying to your favor of the 19th, to which is attached frontage consents granting permission to operate a garage at 2225 West Harrison street, would say that it is not necessary to have said frontage consents approved by the map department; this for the reason that in June of 1916 approved frontage consents were filed with this department granting permission to maintain and operate a garage at that location. Said frontage consents are still on file; therefore, in so far as this department is concerned, a license can issue for the operation of said garage without any further frontage consents being approved and filed.”

You wish to be advised whether after frontage consents have been once filed, the successive owners of a garage may obtain licenses without procuring consents on their own behalf, or whether each new applicant for a license, under conditions requiring frontage consents, is required to file frontage consents before a license to operate a garage may be issued to him.

The ordinances governing the matter of garages are contained in the Council Proceedings of July 17, 1911, on pages 962 and 963.

Section 716 of The Chicago Code of 1911, adopted March 13, 1911, was repealed and the following ordinance passed in lieu thereof:

“Be it ordained by the City Council of the City of Chicago:

“Section 1. It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet of any building used as and for a hospital, church or public or parochial school, or the grounds thereof, and it shall be unlawful for any person, firm or corporation to locate, build, construct or maintain any garage in the city in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without securing the written consent of a majority of the property owners according to frontage on both sides of the street as provided by the ordinances of the City of Chicago.

“Section 2. Any person violating any of the provisions of this ordinance, shall be fined not less than five dollars nor more than one hundred dollars for each offense, and his license shall be subject to revocation by the mayor.

“Section 3. That Section 716 of The Chicago Code of 1911, adopted March 13, 1911, and all ordinances and parts of ordinances conflicting with this ordinance be and the same are hereby repealed.

“Section 4. This ordinance shall take effect from and after its passage and due publication.”

On the same date, Sections 2684 and 2685 of The Chicago Code of 1911, adopted March 13, 1911, were repealed, and the following ordinance passed in lieu thereof:

“Be it ordained by the City Council of the City of Chicago:

“Section 1. No person, firm or corporation shall keep, conduct or operate a garage in this city without first obtaining a license so to do in the manner hereinafter provided, and it shall not be lawful for any person, firm or corporation to locate, build, construct or maintain any garage within two hundred feet of any building used as and for a hospital, church, or public or parochial school or the grounds thereof, nor shall any person, firm or corporation locate, build, construct or maintain any garage in the city in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes, or within one hundred feet of any such street in any such block, without the written con-

sent of a majority of the property owners according to frontage on both sides of the street.

"Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction of any such building; provided, that in determining whether two-thirds of the buildings on both sides of said street are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered; and provided, further, that the word 'block,' as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets, one on either side of the lot on which said garage is to be located, built, constructed or maintained.

"Section 2. Any person desiring to keep, conduct or operate a garage shall make application to the mayor on a form to be provided by the city collector. Such applications shall set forth the name of the applicant, and, if an individual or individuals, the place of his or their residence, and, if a corporation, the names of the officers and their places of residence. Such application shall also contain the location of the place at which it is intended to keep such garage and the number of vehicles to be kept in such garage for the purpose of letting for hire or reward, together with a description of the style or type thereof. The mayor shall thereupon issue or cause to be issued a license upon the payment by such applicant to the city collector of a license fee in accordance with the rates hereinafter fixed.

"Section 3. For all garages where vehicles are kept ready for use and where rent is paid to the keeper thereof for such keeping, or where vehicles are kept to be let out for hire or reward, or where vehicles are kept ready for use and where rent is paid to the keeper thereof and where vehicles are kept to be let out for hire or reward, the license fee shall be twenty-five dollars per annum.

"Section 4. All such licenses shall expire on the thirty-first day of December, following the date of issue, and, when issued for a period of more than six months, the license fee shall be the full annual license fee prescribed in the foregoing section. When issued for a period of less than six months, the license fee shall be one-half of the annual fee prescribed in the foregoing section.

“If such garage keeper shall at any time, before the expiration of any license issued to him under the provisions of this article, change his place of business, he shall forthwith give notice of such fact to the city collector.

“Section 5. Any person violating any of the provisions of this ordinance, shall be fined not less than five dollars nor more than one hundred dollars for each offense, and his license shall be subject to revocation by the mayor.

“Section 6. That Sections 2684 and 2685 of The Chicago Code of 1911, adopted March 13, 1911, and all ordinances and parts of ordinances conflicting with this ordinance be and the same are hereby repealed.

“Section 7. This ordinance shall take effect from and after its passage and due publication.”

We have thoroughly examined the foregoing ordinances and we believe that it is manifest that they require only an initial petition for frontage consents for the continued operation of a garage at a given location.

We do not believe it is the intent, in a case where the owner of property procures frontage consents for the erection of a garage and erects a garage after said frontage consents are procured, to deprive the owner of the value of said premises by requiring him to obtain the consent of the people in the immediate vicinity, if these consents have been once obtained.

The evident purpose of this ordinance was to give to the surrounding property owners the right to determine whether or not they favored the maintenance of a garage contiguous to their property, and this purpose will be fully accomplished by the procuring of the initial frontage consents for its erection or maintenance. The consent once obtained fixes the character of the property, and the continuation of the usage does not add any additional burden. The consent given is for the operation of a garage, and it is the character of the business that is regulated, not the person conducting it.

From the foregoing we are of the opinion that the contention of the building commissioner that consents once obtained for the conduct of a garage is all that the ordinance requires,

and that, where a change is made in the person conducting it, new frontage consents are not essential.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Meaning of Words "Public Improvement."

April 30, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire what would be included within the term "public improvement," as used in the proposed ordinance establishing a bureau of purchases and stores.

Under the said ordinance as drafted the purchasing agent of the city is given power to make contracts except for public improvements and contracts which involve concessions or privileges by the city to the contractor, and you state that a question has arisen as to what would be considered a "public improvement."

If the dictionary meaning of the word "improvement" were to be taken literally without associating it in any way with other words, it would be susceptible of a very broad interpretation. But it is now used in connection with real estate as implying a betterment of a permanent nature, and where coupled with the word "public" and used as it is in statutes and ordinances, the two words have a definite and limited meaning.

A public improvement is defined in 32 Cyc. 757, as "an improvement upon any real property belonging to the state or a municipal corporation." This definition, taken from a New York statute, seems to be generally recognized.

In *Blank v. Kearney*, 61 N. Y. Suppl., the court had before it the question whether the board of public improve-

ments or the commissioner of public buildings, lighting and supplies should let a contract for street lighting, and it used the following language:

“Of course, there is a sense in which any service performed for a city, even the humblest, may be deemed a public work; but it seems quite clear to us that only enterprises in the nature of public improvements fall within the purview of this section of the charter.”

In the case of *Brace v. City of Gloversville*, 56 N. Y. Suppl. 331, the court was called upon to interpret the mechanics' lien law under which there was a distinction made between “improvements of real property” and a “contract for public improvements.” The court called attention to the evident intention of the Legislature to preserve the two classes of liens and said: “It may be that no reason exists for such a distinction. I confess I cannot discover any, but plainly the Legislature saw some reason for not including both in the amendment of 1896.” This remark of the court is in point even though in the particular statute construed the term “public improvement” is specifically defined as an improvement upon any real property belonging to the state or a municipal corporation.

In *City of Houston v. Glover*, 40 Tex. Civ. App. 177-183, the court says: “The term ‘works of improvements and public works’ clearly refers to the construction of public buildings and other permanent improvements.”

There are no decisions in our own state which can be cited on the question raised. The term “public improvement,” as used in the mechanics' lien law, was held to include a school house in *Beardsley v. Brown*, 71 Ill. App. 199, and also in *Spalding Lumber Co. v. Brown*, 171 Ill. 487, but this adds nothing to the meaning we may gather from statutes in which the term is used very plainly in the sense indicated above.

The authorities we have cited, in our opinion, are sufficient to establish the meaning of the words “public improvement” with exactness, but if you apprehend that there will be any doubt cast upon the intention of the City Council,

the meaning can be defined in the ordinance itself as including only permanent improvements on real property.

There can be no misunderstanding as to the limits of the power of the respective officers involved in the case of a public improvement when the term is exactly defined. The power of an officer to let contracts for public improvements includes power to purchase the material necessary to construct the same.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

**Claim for Interest on Deferred Payments on Contract
with City.**

May 8, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.
Dear Sir:

We are in receipt of your favor of the 2nd ult., transmitting two letters from The American Cast Iron Pipe Company, claiming interest on deferred payments on its contract with the city.

You ask us to furnish your honorable committee with an opinion as to the city's liability in this matter.

In the case of *Vider v. City of Chicago*, 164 Ill., the court, on page 357, says:

"It is first claimed, that as plaintiff in error was deprived of the use of the money due under his contract with the city for one year by the action of the City Council of Chicago, he may recover the amount of his loss as interest, under that clause of the statute providing for interest where money is withheld by an unreasonable and vexatious delay of payment. In order to recover under this statute money must be withheld by an unreasonable and vexatious delay of payment after it becomes due. Here there was no agreement to pay interest. The money, under the contract, was payable out of the special assessments, and could not be due until collected by the tax collectors under the special assessment proceedings,

and, as appears, as soon as collected the money was paid over. Under such circumstances we perceive no ground upon which it can be held that there was such an unreasonable and vexatious delay of payment as would authorize recovery for interest. The payment may have been delayed for the reason the special assessments were not collected as soon as they should have been, but that has no bearing on the question of plaintiff's right to recover interest under the statute.

"But, aside from this position, a municipal corporation, under the uniform rulings of this court, is not liable to pay interest in the absence of an express agreement. (*City of Pekin v. Reynolds*, 31 Ill. 529; *City of Chicago v. People*, 56 *id.* 327.) In the latter case it is said (p. 334): 'There is no express agreement on the part of appellant to pay interest. In such case, appellant, being a municipal corporation, is not liable to pay interest. (*City of Pekin v. Reynolds*, 31 Ill. 530.) The clause of the contract providing that the contractors should receive the damages which the city might collect of the property owners, to a certain extent, is not equivalent to an agreement to pay interest.' The same doctrine has been declared in other states. *Friend v. Pittsburgh*, 131 Pa. St. 305; *Donnelly v. City of Brooklyn*, 121 N. Y. 9.' "

In *County of Coles v. Goehring*, 209 Ill. 163, the court again sustained this principle of law.

The contract on lines 95, 96, 97 and 98 reads as follows:

"It is expressly understood and agreed that no payment shall be made to the said party of the first part for any extra work or material, or of any greater amount of money than is herein stipulated to be paid, unless some changes in or additions to the contract requiring additional outlay by said party of the first part shall first have been expressly authorized by the City Council of the City of Chicago, and ordered in writing by the Commissioner of Public Works."

In view of the foregoing provisions of the contract in question and the law applying to same, we are of the opinion that the city is not liable for interest in this matter.

Very truly yours,

SCOTT M. HOGAN,

Approved: Assistant Corporation Counsel.

SAMUEL A. ETTTELSON,
Corporation Counsel.

Leave of Absence for Military Service.

May 11, 1918.

MR. JAMES BRICHTA, 2724 So. Springfield Ave., Chicago, Ill.

Dear Sir:

In answer to your letter of April 22, 1918, relative to your right to a leave of absence for military service to accept a position in the war department of the United States, and in the event of your subsequent separation from such position, your status in the classified service of the City of Chicago, I would say that if the necessity for the services required in such position is primarily occasioned by the exigencies of war, and such services are related to and constitute a part of the present system of war activities, rather than merely some service under the civil branch of the Federal government, you are entitled to such leave of absence for military service.

And inasmuch as it appears from your oral statement to me, that the duties of such position consist of the inspection of buildings, warehouses and other properties of the United States and the prevention of any damage and destruction thereof by fire, and the necessity for such services is occasioned solely by reason of the extraordinary exigencies of war, I am of the opinion that, for the sole purpose of accepting such position, you are entitled to such leave of absence for military service.

And, in view of the foregoing, I am of the further opinion that by reason of any such leave of absence, your status as a member of the classified service of the City of Chicago would be the same as that of any other member of such classified service who is now or hereafter on leave of absence for military or naval service; and entitled to the same rights and protection that is now or hereafter afforded any member of such classified service on such leave of absence.

Respectfully yours,

HERVEY C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Vacancies on Account of Incumbent Entering Military or Naval Service.

May 16, 1918.

HON. WILLIAM G. KEITH, Commissioner of Gas and Electricity.

Dear Sir:

Your letter of inquiry concerning your right to fill vacancies was referred to the writer for consideration and reply.

The City Council on March 21, 1918 (Council Journal, p. 2390), passed the following order:

“ORDERED: That no position made vacant on account of the incumbent having entered the military or naval service of the United States Government, or who may enter it during the year 1918, shall be filled by the department heads, unless the same be specifically authorized by the City Council.”

You state that, in accordance with the terms of the above order, you made requests of the Committee on Finance for authority to fill certain vacancies where the need was urgent, but that no action has been taken thereon. You also state that owing to the failure to fill these vacancies the work of the department is hampered and impeded and that certain records are in a chaotic condition. You therefore ask whether, in view of the emergency existing, you are bound to wait for action on your requests or may fill the positions that you deem necessary.

In our opinion this order has no legal significance. At best it amounts to only a request, since the City Council can not by such an order revoke the authority given to the heads of the department by statute and by ordinance.

The order in question may have been passed with the object in view of preserving the places of persons who are called to the service during the war. In the appropriation bill for the current year the City Council designated a number of positions for which no appropriations were made and this was probably done for the same reason. It is possible also that the order may have been prompted by motives of econ-

omy. But whatever the motive that does not add to the force of the enactment.

We are not called upon at this time to pass on whether or not the failure to make an appropriation for a designated position is an effective method of keeping the places open for those who have gone into the service of the nation on account of the war, but, so far as these positions not appropriated for are concerned, you have of course no authority to fill them.

To the extent, therefore, that the order in question applies to positions which were vacant before the passage of the annual appropriation ordinance and for which no appropriations are made therein, there is no force to the order, because such positions could not be filled even if no such order had been passed.

To the extent that the order is intended to apply to places for which appropriations were made that have become vacant since the passage of the appropriation bill, it would, if carried into effect, violate the provisions of the civil service law and it would also amount to an attempt to override the provisions of an ordinance by an order. Necessarily such an order is ineffective.

Appointments to the classified service of the city are governed by Section 10 of the Civil Service Law. The head of the department is given ample power by the provisions of that section to fill a vacancy where an appropriation for the position exists. The City Council also specifically provided by Section 7 of the appropriation bill (Council Journal, February 20, 1918, p. 2108) that "unless otherwise provided by statute or ordinance" places shall be filled by the head of the department "in accordance with the provisions of the Civil Service Act."

Hence, without even touching on the question of the right of the City Council to exercise functions of an executive nature such as controlling appointments for vacancies, the authority vested in you as the head of the department to fill a vacancy when you deem it necessary is so clear that you are not bound to wait until the City Council has acted on your

request. If you heed the order to the extent that you have indicated, that is to say if you make the request and only fill the position when you find it imperatively necessary, you are in fact doing so voluntarily and not because the law compels you to.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Frontage Consents for Switch Track.

May 23, 1918.

HON. ALBERT J. FISHER, Chairman, Committee on Local Industries.

Dear Sir:

The letter of James T. Igoe, city clerk, of May 11, 1918, to the Honorable Samuel A. Ettelson, Corporation Counsel, requesting an investigation and report on the matter of the legality of the filing of frontage consents under an ordinance passed January 24, 1910, granting permission and authority to Charles J. Vopicka and Otto Kubin (Western Shade Cloth Company, successor), to construct and operate a railroad switch track in Spring street and across West 21st street, near South Jefferson street, handed to me for attention.

I find from the records of the City Council that on November 1, 1909, an ordinance was introduced by Alderman Egan in reference to this switch track and referred by the council to the committee on local industries (C. P. 1909-10, p. 1573); that on January 10, 1910, a substitute ordinance on the same switch track was recommended for passage by the committee on local industries (C. P. 1909-10, p. 2526); that on January 24, 1910, a substitute ordinance, recommended by the committee on local industries, was passed (C. P. 1909-10, p. 2864); that on January 9, 1911, Commissioner of Public Works B. J. Mullaney sent a letter to the City Council saying

that his attention had been called to the fact that the frontage consents were not on file, and that the same had been considered but had been in the hands of the committee on compensation, and that he had had the same verified by the map department, and that he was transmitting the same to the City Council, asking that it be printed and placed on file, which was done by the City Council; that the petitions containing the frontage consents to the ordinance were dated November 27, 1909, and were specifically directed to an ordinance introduced November 1, 1909.

I was also informed by Mr. McGurren of the Compensation Bureau that the frontage consents were attached to the original ordinance of November 1, 1909, at the time the ordinance was first introduced into the council, and that the same were detached by either some member of the committee or some city official, and that the same had been among the files of the Committee on Compensation until transmitted by the letter of the commissioner of public works on January 9, 1911.

The courts have uniformly held that the procuring of the necessary frontage consents is jurisdictional, and, unlike conditions subsequent which may be waived by municipal authorities, the failure to secure sufficient frontage consents is fatal to the grant, and if there was no petition on file by the required number of property owners at the time of the passage of the ordinance, then the city was without authority to pass the ordinance and the same is null and void.

Assuming, then, that there was no petition on file in the city clerk's office, having the required consent of the abutting property owners, the question then arises as to what weight is to be given to the letter of Commissioner of Public Works B. J. Mullaney transmitting frontage consents on January 9, 1911, a year after the passage of the ordinance. That letter itself is no legal competent evidence. Evidence that the frontage consents were actually a part of the records, either of the City Council or counsel committees, or were officially in the custody of the proper persons, and that the council considered and acted upon the same, would have to

be derived from other sources, and the efficacy of the evidence would depend upon the kind of proceeding in which the validity of the ordinance was in question.

There also arises the question as to whether the consent or petition signed by the property owners could apply to any other ordinance than that introduced November 1, 1909. The Supreme Court of the State of Illinois held, in the case of *Wilder v. Aurora, etc., Traction Co.*, 216 Ill. 523, citing *Vennum v. Village of Milford*, 202 Ill. 423, that where an ordinance based upon a petition of property owners was invalid and the confirmation proceeding was dismissed the same petition could not be used by the improvement board as a basis for recommending another ordinance. In this case the ordinance of November 1 was placed on file and a substitute ordinance was passed, as per the recommendation of the committee on local industries appearing in the council proceedings, as hereinbefore stated. There is a very grave question as to whether or not the frontage consents did not become null and void when the ordinance of November 1, 1909, was placed on file.

From the foregoing I am of the opinion that the City Council was without authority to pass the ordinance.

Yours very truly,

FRANK R. REID,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Construction of Jetties from Proceeds of Harbor Bonds.

May 28, 1918.

HON. JOHN A. RICHERT, Chairman Committee on Finance:

Dear Sir:

We are in receipt of your letter of recent date inquiring whether the expense of jetties between 75th and 79th streets for shore protection can be defrayed from proceeds of harbor construction bonds.

It is stated by the commissioner of public works that the storms of the past winter washed away a great deal of the land along the shore of the lake between 75th and 79th streets, and that it is imperative that the city should take prompt action to protect its property there. The proposed protection consists of a series of jetties running into the lake.

Although a special bond issue for purposes of lake shore protection, improvements and equipment at 51st street and 79th street bathing beaches was not approved by the voters when it was submitted to them in April, 1917, there does not appear to be any reason why the proceeds of harbor bonds can not be drawn on for the purpose.

The harbor construction bonds issued under the ordinance of February 19, 1912, are "for the purpose of acquiring the necessary sites and constructing protection breakwaters, docks and piers in the City of Chicago." (Council Journal, pp. 2812-13.)

The Century Dictionary says that the word "jetty" comes from a French word meaning a pier, breakwater or jetty. The same work defines "breakwater" as "any structure or contrivance, as a mole, mound, wall, or sunken hull, serving to break the force of waves and protect a harbor or anything exposed to the force of the waves." Thus, it will be seen that the term "breakwater" includes such structures as are proposed, and that the bonds specifically provide for the construction of protection breakwaters.

The fact that the harbor at this point is adapted to and will be used for bathing does not preclude its improvement through the means afforded by the issuance of "Harbor Construction Bonds," since such construction is not limited, by the ordinance authorizing the bonds, to commercial uses. Neither does the fact that it was the intention of the City Council at one time to provide for the particular work in question by another issue of bonds militate against the use of the proceeds of the harbor bonds which were issued under authority broad enough to make such use possible.

We are therefore of the opinion that the cost of construction of these jetties may be paid out of the harbor bonds.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Persons Offering to Make Inspections of Scales.

Chicago, May 31, 1918.

HON. MORRIS ELLER, Inspector of Weights and Measures.

Dear Sir:

Your letter concerning the practice of testing scales by persons representing competing manufacturers and your suggestion concerning changes in Section 2849 to remedy the evils complained of were referred to the writer.

It appears that certain persons with kits of test weights are going around testing the scales of storekeepers throughout the city; that they pursue their calling in such a way as to convey the impression that they have some official standing but are in fact agents of a scale company seeking means of selling scales; that they frequently represent to a person who allows them to test his scales that there are faults in same which do not exist; and that in other ways they hamper the work of your deputies and create a feeling against the city's officers among persons who believe that the latter are condoning the practice.

It would be difficult to frame an ordinance which would do away entirely with the abuses that exist. No valid law can be passed which will prohibit a man from testing another's scale if the owner of the scale consents. Nor does the fact that such tests afford a means of unfair competition render the situation any more susceptible of correction.

Nevertheless, we are of the opinion that the practice which you complain about can be kept within bounds. It is in a certain sense an interference with the free exercise of the

police powers for the benefit of the people if persons are led to believe that they are being burdened with inspections and complaints when this condition does not exist. Anything which tends to breed contempt or disrespect for the duly authorized officers of the law can be reached by proper legislative enactment. While, therefore, it may be that a scale company is within its rights when it sends out persons who call themselves inspectors or testers as long as they do not make any misrepresentation as to their authority, any intimation that these agents are acting in the capacity of public officials or that public officials are assisting them may be prohibited.

To meet this situation we have drafted amendments to Section 2849, which will make it unlawful for persons to misrepresent their true status when they ask for permission to test scales. We have not followed your suggestions closely, because we believe that the provisions you wanted are not specific enough, but we have endeavored to cover the ground as fully as possible.

We transmit the amendatory ordinance herewith.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Contract with Fitz Simons & Connell Dredge & Dock
Company.**

May 31, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether it is necessary, in carrying on the work of completing the Wilson avenue tunnel and crib, that you should follow the provisions of the statute relating to the construction of a public improvement by day labor in so far as

letting contracts for materials, etc., is concerned. You state that this would involve the necessity of preparing plans and specifications, advertising, and other formalities which would seriously delay the work.

We are of the opinion that the contract with the Fitz-Simons & Connell Dredge & Dock Company, under which the work is being carried on, imposes no such obligation on the city. In fact, under the terms of said contract it would be impossible to comply literally with the provisions of the statute concerning the making of public improvements by day labor, because the agreement provides for taking over the materials on hand and contracted for by this corporation.

To make our position clear on this point, we will state briefly what distinguishes the present contract from the situation that would be presented in case the city was either proceeding on an original contract by day labor, or was finishing an abandoned contract as in the case of *Hanreddy v. City of Chicago*, 211 Ill. 24.

In the Hanreddy case a contractor abandoned his contract, and the city thereupon undertook to perform the work by day labor without any agreement with the defaulting contractor, under the theory that it could proceed in any way it saw fit to complete the contract. There was at that time no provision in the statutes for doing work that way, and the court held that the city had no authority to step in and do the work abandoned by the contractor if it amounted to more than \$500, but was bound to advertise for bids on the incompleting contract and let same to the lowest bidder or award a contract without advertising by a two-thirds vote of the aldermen.

Since then the statute has been amended so that the city can construct a public improvement by day labor, but the same statute requires that all materials which go into the work, where their value amounts to \$500 or more, must be purchased by contract let to the lowest responsible bidder after advertising.

Hence, if the work had originally been undertaken by the city on the day labor basis, it would be necessary to purchase

the materials in strict conformity with the provisions of the statute.

But this is not a case of an abandoned contract. The contractor is still bound by all the terms of the original contract, except that there is now an agreement that the city will complete the work at the contractor's expense. This agreement is based on the provisions of the original contract which authorizes the commissioner of public works under certain conditions to take the work out of the hands of the contractor and complete it. The contractor and its sureties have consented to this arrangement on condition that the city will take over the materials on hand and contracted for by it, and they have consented to allow the city to draw on the amount it has reserved up to the present time on estimates of work completed heretofore, and to make good any deficiency that may exist when the work is completed.

By this arrangement the contractor is still bound by the agreement in the original contract to perform the work for certain stipulated unit prices, and the city has become in a sense a sub-contractor—that is to say, the construction division which is doing the work is finishing the improvement for the contractor.

Under such conditions the terms of the arrangement with the contractor must control, instead of the statute which provides for making public improvements by day labor.

There is nothing which prevents the officers of the city from advertising and taking bids for materials and services which it does not employ directly, but it is not bound to do it under the terms of the arrangement with the contractor based on the power given to the commissioner of public works in the original contract to go into the open market and purchase materials necessary to complete the work.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

License for Raising or Shoring Houses.

June 1, 1918.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your favor of recent date, forwarding to us a communication which you received in which you are asked whether persons securing a license, under Sections 2117 to 2127, inclusive, of The Chicago Code of 1911, prior to January 14, 1918, are to be permitted under the said license for which a fee of \$5.00 has been paid to the city, to engage in the business not only of house moving but also to engage in or carry on the business of raising or shoring houses.

In reply, we beg leave to advise you that prior to January 14, 1918, the City Council did not pass any ordinance regulating or licensing the business of raising houses or of shoring same. The ordinance prior to said date only licensed persons to engage in the business of house moving, and for that privilege a license fee of \$5.00 per annum was charged. On January 14, 1918, the council passed an ordinance amending Sections 2117 to 2120, inclusive, and 2123 to 2126, inclusive, of The Chicago Code of 1911, and included in said ordinance not only persons, firms or corporations engaged in the business of house moving, but also those engaged in the business of raising or of shoring houses, and the ordinance as amended raised the license fee from \$5.00 per annum to \$50.00.

You inform us that prior to the amendment of this ordinance on January 14, 1918, a number of persons secured a house mover's license for which a fee of \$5.00 was paid to the City of Chicago, and you desire us to advise you if the persons so licensed may engage, under the license issued to them, in the business of house raising or shoring in addition to the business of house moving.

In our opinion, while persons licensed as house movers prior to the amendment of the ordinance on January 14, 1918, could engage in the business of house raising and shoring as well as house moving under the license issued to them, they

were permitted to do so only because the City Council did not see fit to license or regulate the business of house raising or shoring.

The amendment to the ordinance, however, has changed conditions so that in our opinion, since January 14, 1918, persons, firms or corporations not licensed under the new ordinance can not perform any work or engage in any business by virtue of any license secured under the old ordinance except in the business of house moving. Any such persons, firms or corporations desiring to engage in the business of house raising or shoring must apply for and secure a license under the amended ordinance and must pay the fee required by the amended ordinance for said license.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Wages of Deceased Employee.

June 3, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication to the corporation counsel, relative to the claim of Mrs. Anna O'Brien for wages alleged to be due Eugene J. O'Brien, deceased, has been referred to me for investigation and reply.

On or about October 11, 1903, O'Brien was appointed as pipeman in the Fire Department pursuant to a civil service examination and certifications by the Civil Service Commission. Thereafter, on May 20, 1911, he was suspended from duty by order of the fire marshal. On or about May 25, 1911, charges were filed against him with the Civil Service Commission, charging him with inefficiency and being unable to perform his duties as a pipeman on account of alcoholic excesses.

On June 2, 1911, the Civil Service Commission entered its decision in the matter of said charges as follows:

“Upon investigation of the within charges, we find that a notice stating the time when and the place where this investigation was to be held, together with a copy of the charges herein, was duly served on said Eugene J. O’Brien more than five days prior to this investigation and the said Eugene J. O’Brien appeared in person. Whereupon all witnesses were sworn and their evidence was heard by the fire trial board, and we further find from the evidence that the said Eugene J. O’Brien is physically incapacitated and unfit for the performance of duty as a pipeman but the board does not find the cause of such incapacity and unfitness and it is hereby ordered that he be discharged from the Fire Department and from the service of the City of Chicago.

H. M. CAMPBELL, “
JOHN J. FLYNN,
HOWARD O. SPROGLE,
Fire Trial Board.”

Thereupon O’Brien was separated from the service of the city.

Thereafter, on July 1, 1911, a petition for a rehearing of said charges was filed with the Civil Service Commission by said O’Brien and on July 14, 1911, the Civil Service Commission made the following ruling:

“Petition for rehearing of Eugene J. O’Brien, ex-member of the Fire Department, denied without prejudice.”

On August 2, 1911, the said Eugene J. O’Brien filed his application for a pension with the board of trustees of the Firemen’s Pension Fund, wherein it was alleged that on or about October 1, 1909, while in the performance of his duties as fireman he was injured in responding to an alarm; that the truck upon which he was riding was struck by a street car and he was violently thrown to the ground and received severe injuries; that he was taken to the County Hospital, where he remained four days; that his leg and knee were placed in a plaster cast and so remained for about a month; that he resumed his duties on November 18, 1909, and remained on watch duty until December 27, 1909, when he was again taken sick as a result of said injuries; that from January 11, 1910, until March 25, 1910, he was confined in the Park Ave-

nue Hospital; that he resumed his watch duty from March 26, 1910, to April 15, 1910, when he was ordered back to work; that as a result of said injuries he is permanently incapacitated and unfit for the performance of duty as a pipeman.

On August 24, 1911, the said Eugene J. O'Brien died, and thereafter, on December 1, 1913, a petition for a writ of certiorari was filed in the Circuit Court by Mrs. Anna O'Brien, widow of Eugene J. O'Brien, seeking to review the record and findings of the Civil Service Commission in the matter of the foregoing charges against Eugene J. O'Brien.

On May 16, 1916, the cause came on to be heard before Judge Gibbons, who ruled that the finding of the Civil Service Commission was illegal for the reason that it failed to find the cause of the incapacity of O'Brien; that if such incapacity resulted from injuries received in the performance of his duties, he would be entitled to a pension and should not have been ordered discharged.

Thereupon the court ordered that the record and proceedings of the Civil Service Commission in the matter of the aforesaid charges be quashed and set aside, which was done accordingly, thus restoring O'Brien to the legal status possessed by him on May 20, 1911, the date of his suspension. This judgment remains unreversed and unappealed from and is in full force and effect.

The claim now made by Mrs. Anna O'Brien, widow of Eugene J. O'Brien, is, as we understand it, for wages due O'Brien from May 20, 1911, to the date of his death, with the same rights that he had prior to May 20, 1911, this being the legal effect of the aforesaid ruling of the Circuit Court.

Our Supreme Court in *People ex rel. Jacobs v. Coffin et al.*, 282 Ill. 599, awarded a writ of mandamus to reinstate Jacobs and to pay him his back salary, including the period of his suspension prior to his discharge.

Under the foregoing ruling, the discharge of O'Brien having been adjudged to be unlawful he would be entitled to his salary from the date of his suspension up to the date of his death.

We are, therefore, of the opinion that the foregoing claim of Mrs. Anna O'Brien in this matter should be allowed.

Respectfully yours,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Voucher for Construction of Michigan Avenue Bridge.

June 6, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

You forwarded a voucher drawn in favor of Great Lakes Dredge & Dock Company for a net amount of \$28,000, as part payment on the work of constructing the bridge at Michigan avenue, with a request for advice as to the form in which vouchers should be drawn for this purpose.

The voucher in question is in the usual form requiring payment from the amount assessed against the city for public benefits payable only when a proper appropriation for such public benefits has been made.

It is indicated on the voucher that the same is payable out of the first installment, and this seems to be the only thing about it that does not conform precisely with the situation. Ordinarily, in making appropriations for the payment of public benefits, the City Council designates the amount payable on each installment. In the present instance it has appropriated the sum of \$2,800,000 payable out of the bond fund for the judgment rendered against the city for public benefits for widening and improving the streets and constructing a bridge. (Council Journal, March 26, 1918, p. 2496.) It has not attempted to divide the appropriation into the exact amounts required for the installments, but has made a lump sum appropriation which may be drawn on until exhausted.

You state that this is the first instance where a public improvement of this nature has been charged to special assessments. This may be true, because ordinarily a bridge is taken care of by the city independently of the balance of the improvement. But in this case you will find by reference to the ordinance under which the improvement is being made that the bridge is included as a part of the local improvement to be paid for by special assessment. (See Ordinance, Council Journal, March 9, 1914, pp. 4234-4297.) Section 3 of that ordinance (p. 4297) says that the whole cost of the improvement shall be paid for by special assessment in accordance with the act concerning local improvements.

The only other point to be considered is the effect of the ordinance providing for an advancement payable out of the proceeds of the special assessment. (Council Journal, March 26, 1918, p. 2498.) By this ordinance the city advances a sum of money not exceeding seventy-five per cent of the total amount levied against private property, and the whole of the assessment levied against such private property is pledged as security for said loan. The money so advanced is to be used in paying final judgments of condemnation.

It follows that the city can not pay its public benefits out of the money so advanced. Consequently the payment contemplated by this voucher must be from the appropriation above referred to from the bond fund.

We see nothing objectionable about the form of the voucher. Even the figure "1" appearing opposite the words "Installment No." is not a serious matter, since the general appropriation made can be applied to the first installment.

We return voucher which you submitted herewith.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

**Use of Traction Fund for Purchase of Judgments Against
the City.**

June 6, 1918.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date stating that the Committee on Finance desires an opinion as to the right of the city to purchase with money from the traction funds any part of the judgments against the city held by The Sanitary District of Chicago.

The right of the city to invest the fund commonly known as the traction fund has received attention from this department on several occasions. We have uniformly held that this fund stands on a different footing from funds created under statutory provisions, and that it is in the nature of a trust fund which may be invested in securities of such a stable character that they will be readily convertible into cash if the necessity should arise. (See Opinions of Corporation Counsel, 1913-14, p. 270, and Opinions of Corporation Counsel, 1914-15, p. 26.)

In the case of a statutory fund, the right to use same for any other purpose than that for which it was accumulated is governed by the provisions of the law which give express authority to use it. By these provisions such funds may now be used for the purchase of tax anticipation warrants, the city's own municipal bonds, etc. Under the rule that where such specific authority is given by legislative enactment it must be construed as precluding the use of such money in any other way, the use of such funds as the water fund, pension funds, sinking funds, etc., is limited to the uses expressly permitted by statute.

It is different, however, with the traction fund, which was created by and accumulated under ordinances which the City Council itself framed and over the provisions of which it had complete control. The council could have imposed restrictions on the use of the money while it is held

in trust as well as restrictions on the final use that it is put to. But, it did not see fit to do so.

In the absence of any restrictions on the use of the money while it remains in the treasury as a trust fund and is being accumulated for a specific purpose, it may be invested. The rule in such cases is stated in *McQuillin on Municipal Corporations*, Section 2163, as follows:

“Seldom have municipal corporations surplus moneys for loan or investment. But where such a condition of affairs presents itself, the municipality has power to loan or invest in proper securities, unless it should be forbidden by statute.”

A case almost exactly parallel to this is found in what is spoken of as Sinking Fund cases, 99 U. S. 700. There a sinking fund was established in the treasury of the United States under an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean. The secretary of the treasury directed the purchase of some U. S. government bonds, and the same question that is presented here was gone over by the U. S. Supreme Court in that case, the only difference being that it was contended in that case that the money should not be invested except for purposes of payment of the obligation ultimately to be met. The court said, on page 725:

“To our minds it is a matter of no consequence that the secretary of the treasury is made the sinking fund agent and the treasury of the United States the depository, or that the investment is to be made in the public funds of the United States. This does not make the deposit a payment of the debt due the United States. The duty of the manager of every sinking fund is to seek some safe investment for the moneys as they accumulate in his hands, so that when required they may be promptly available. Certainly no objection can be made to the security of this investment. In fact, we do not understand that complaint is made in this particular. The objection is to the creation of the fund and not to the investment, if that investment is not in law a payment.”

The following additional authorities sustain our position:

Foote v. City of Salem, 96 Mass. 87.

Commissioners v. Walker, 38 Am. Dec. 433.

We are therefore of the opinion that it is within the power of the City Council to provide by ordinance for the purchase of judgments against the city out of the traction funds. It may involve some complications in case a judgment is divided so that only a part of it is purchased from these funds, and we advise against such partial purchase if it can be avoided, although we know of no legal obstacle in the way of a partial purchase if it is found impossible to divide the judgment.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Eligibility of Employee for Disability Benefits.

June 6, 1918.

BOARD OF TRUSTEES OF THE MUNICIPAL
PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

We beg to acknowledge receipt of your communication of May 16, requesting us to furnish you with a written opinion covering the question of eligibility to disability benefits, under Section 9, of an employe designated as section foreman who has contributed to the pension fund since May, 1915, and who claims to have been in the employ of the city since 1896.

In reply, we beg to advise you that Section 9 of the Municipal Pension Fund Act provides, in part, as follows:

“Any employe who has been in the service of said city, village or town for a period of five (5) years, or more, from and after July 1, 1911, shall have the right to retire from active service on account of serious disability, rendering him or her unable to properly discharge his or her duties, and may become a beneficiary under this act and be entitled to receive pension in an amount equal to that provided for an employe who retires under the provisions of Section 7 hereof and whose payments into the fund, in form of deductions from salary or wages and

payments as prescribed in Section 1 hereof, are equal to those of said disabled employe."

The remainder of Section 9 of the Municipal Pension Fund Act is not material in determining the question involved herein, but simply provides how the proof of disability shall be made. The person referred to in your communication, namely, Frank Stella, appears to have entered the service of the city in May, 1896, and to have worked continuously until he received the injury referred to in your communication.

Prior to May, 1915, he was not in the skilled labor service class of the city and as a result thereof did not contribute to the Municipal Pension Fund; that he has worked for five years since July 1, 1911, for the City of Chicago, must be conceded. When Stella entered the employ of the city the civil service law was in force and effect, and, presumably, he secured his position in accordance with the provisions of the civil service law.

In our opinion, such an employe is entitled to claim the benefits of the provisions contained in the Pension Fund Act providing for pensions for disability. There does not appear to be anything in Section 9 that requires an employe who files a claim for a disability pension to pay into the fund an amount equal to five annual payments. Stella has paid in for three years, and we are of the opinion that it is within the discretionary power of the board to require applicants for disability pensions who have not contributed to the fund for five years, before applying under Section 9, to pay into said fund in such amounts and at such time as the board may determine, an amount of money equal to the amount contributed by a participant in the Pension Fund during a period of five years.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Advertisement for Sale of Lands for Delinquent Special Assessments.

June 6, 1918.

HON. CHARLES C. CASE, Assistant State's Attorney in Charge
of County Affairs.

Dear Sir:

In pursuance of request made by you at the conference with the representative of the county collector and others with reference to the advertisement and sale of lots and lands for delinquent special assessments, we submit the following:

Sections 129 and 229 of the Revenue Act were amended in such a way that where there was a forfeiture to the state for want of bidders in the case of a delinquent special assessment it was to be treated in the same manner as in the case of a forfeiture for general taxes.

This only carries out the intention of the statute as it existed before, as we have always contended it should be construed. Whatever confusion there was heretofore has been caused, in our opinion, by the fact that the Supreme Court, in construing the Revenue Act, has in some cases held that the words "tax" and "taxes" do not include special assessments, while in other cases the statutory definition of the word "tax" has been applied. We are satisfied that, with respect to the definition of the word "tax" as applied to the course to be pursued in case of forfeitures, the Supreme Court would undoubtedly have held that the same included special assessments, even before the amendment of the sections in question.

Section 292 of the Revenue Act defines "Tax-Taxes," as used in the act "whenever it shall be necessary to the proper construction of this act," to mean "any tax, special assessment or costs, interest or penalty imposed upon property."

By Section 201 the collector is required to offer for sale lots and lands on which the taxes, special assessments, interest or costs have not been paid, in pursuance of the judgment order.

Under Section 202 the person offering to pay the amount due for the least percentage is designated as the purchaser,

and it is provided that no bid shall be accepted for a penalty exceeding 25 per cent of the amount of "such tax or special assessment."

Then Section 203 provides that "every tract or lot so offered at public sale, and not sold for want of bidders, shall be forfeited to the State of Illinois." We do not see how there can be any question as to the meaning of this last provision. It must be understood as including lands and lots on which special assessments are delinquent when there were no bids made.

Turning now to Section 229 as it read before it was amended, we find that "the amount due on lands and lots previously forfeited to the state" should be added to the tax of the current year. We have always contended that this contemplated that the amount due on delinquent special assessments, where there was a forfeiture, was to be included. This has not been done, however, and to overcome any doubt as to the meaning of the section we had it amended so that it now reads "the amount due for general taxes and special assessments on lands and lots," etc.

Up to this point, while there has been a change in the wording of the statute, the intention was simply to make clear an ambiguity. But while this ambiguity was incidentally cleared up, the real purpose of amending Section 229 was to provide a way of again including special assessments which were withdrawn from collection where the land or lot was forfeited for general taxes.

For years there had been a question as to the right of the city to withdraw delinquent special assessments from collection. The right to do so is now positively granted by statute. In amending the statute to confer this right the question was how to get these withdrawn special assessments back into the collector's hands for collection. It is our opinion that we would have had the right to do this in case there was no forfeiture under Section 277, which reads as follows:

"TAX NOT COLLECTED ADDED TO SUBSEQUENT YEAR)
 § 277. If the tax or assessment on property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other

cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year, in separate columns designating the year or years."

In case of forfeiture for general taxes, however, the right to add the delinquent special assessment which was withdrawn from collection to the tax for the current year was a matter that was not provided for by statute. We contended that we had the right, under Section 277, when there was no forfeiture for general taxes, to put the assessment into collection again as a back tax, but this right was subject to doubt. We also contended that we had the right, under Section 229, to have the delinquent special assessment added in where there was a forfeiture, although this was also subject to doubt. But there was no provision whatever for adding in a withdrawn special assessment where there was a forfeiture. Hence, we undertook to clear up the whole situation by removing the doubt as to the right to add in the back tax and the right to have the delinquent special assessment added into the aggregate after forfeiture, and to provide for adding in the withdrawn special assessments when the aggregate was made up after a forfeiture. We assumed that this was entirely practicable, and drafted the amendment accordingly.

The question that has now arisen is whether it is necessary, in the case of making up the aggregate to be collected after forfeiture, to include in that aggregate the special assessments that were either withdrawn or on which there was a forfeiture. This involves a construction of the following portion of Section 229, as amended:

"§ 229. The amount due for general taxes and special assessments on lands and lots previously forfeited to the state and remaining unpaid on the first of November, and on lands and lots on which such special assessments were withdrawn from collection, shall be added to the tax of the current year; and the amount thereof shall be reported against the county collector with the amount of taxes for said year; and the amount so charged for said forfeitures on general taxes and special assessments shall be placed on the tax books, collected and paid over in like manner as other taxes."

It is perfectly clear that it was the intention to add in the aggregate such delinquent special assessment when there was a forfeiture and to leave it out where there was no forfeiture, but we do not believe the language necessarily implies that there would be anything unlawful in keeping special assessments distinct from general taxes. The language is to the effect that both are to be added to the tax of the current year, but only the amount charged for the forfeiture is to be placed on the tax books, collected and paid over in like manner as other taxes. Thus, it is plain that as to withdrawn special assessments the intention was to add them to the tax for the current year by placing them again in collection. They are on precisely the same footing as back taxes.

The Supreme Court has held that so far as back taxes are concerned they are simply to be added to the current year's tax. (*Neff v. Smyth*, 111 Ill. 100; *Belville Nail Co. v. People*, 98 Ill. 399.) At the same time the court held, in *Stamposki v. Stanley*, 109 Ill. 210, that the aggregate should be made up of these as well as of the amounts due by reason of the forfeiture. It based this decision on the theory that a person who is delinquent can not be harassed by more than one judgment nor by being compelled to search the records in one place for taxes due by reason of forfeiture, at another place for back taxes, and at still another place for the current year's taxes. But that this relates to the general taxes only seems quite clear from the decision itself, which holds that "there are special cases provided for by statute where different classes of taxes may be collected separately." The obvious answer to any contention that there must be an aggregate of all taxes made up is that the statute provides for special assessments as a different class of taxes that need not be included in this aggregate.

If it were possible to do so, the best way of handling the matter would be, in case of forfeiture, to include in the aggregate to be extended the following year all the taxes, special assessments, costs, charges, etc., on which the forfeiture had been made, and to carry forward the withdrawn special assessments and add them to the current year's special assessments. But we are told that an insuperable obstacle presents

itself by reason of the large number of installments and by the fact that there are in many cases a number of special assessments levied on a single piece of property all payable in installments. That being the case it was found impracticable to adopt what we have indicated as the best way of handling the matter.

We are therefore compelled to fall back on the only other way of following out the provisions of the statute. That is to say, we are compelled to add all delinquent special assessments to the current year's special assessments, and to advertise and sell the property in a separate sale from the general taxes. We do not think that the Stamposki case, above cited, prohibits this. The most that case does is to require all taxes to be included in the one aggregate, and it leaves the way open for including all special assessments in another aggregate. Nor does the wording of Section 229, as amended, preclude the possibility of doing it in this way. It is true the language used is to the effect that all should be added to the tax of the current year, but it does not say that there must be one aggregate, and there is nothing from which it can be inferred that it would be improper to add these delinquent special assessments to the taxes of the current year by including them in the list of current special assessments kept separate and apart from the general taxes.

We are therefore of the opinion that there will be a full compliance with the law if the county collector will include in the aggregate to be extended as the general taxes all general taxes on which there was a forfeiture, all back general taxes and all current general taxes and advertise the same, if not paid, under the delinquent general taxes, and then include all delinquent special assessments, withdrawn special assessments and current special assessments in another aggregate and advertise the same as delinquent special assessments if not paid by August 1st.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Payment of Rent for Quarters Occupied by Department of Public Welfare.

June 7, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter concerning rents due for quarters occupied by the Department of Public Welfare was referred to the undersigned for attention.

It appears from your letter that this department is occupying quarters in the City Hall Square Building which were formerly leased to the city. This lease expired April 30, 1917, but the rent was paid up to December 31, 1917, by the city. At the present time there is due rent for five months which accrued during the year 1918, and notice has been served that unless such rental is paid before June 10, 1918, the landlord will take possession of the premises.

Your letter also indicates that a somewhat similar situation is presented in the case of the People's Life Building where the employment bureau of the same department is located. The only difference is that rent has been paid at this place until May 1, and that the lessors have requested payment for the rent for May.

You show that the corporate rents are provided in the 1918 budget under Account 22-R appearing on page 2116 of the Council Journal of February 20, 1918. There was a lump sum appropriation of \$71,276.43 for rents for real estate and buildings. You also state that from your analysis of existing leases you are satisfied that there will be a salvage in this account of approximately \$6,500.00 which is more than enough to take care of both of the Department of Public Welfare leases for the year 1918, and you ask whether the comptroller has the legal authority to pay the rent for said quarters from said account.

We are of the opinion that this entire matter rests in the discretion of the city comptroller. The first paragraph of Section 36 of The Chicago Code of 1911 reads as follows:

"LEASING OF REALTY—APPRAISERS.) Said comptroller is authorized to execute any and all leases of real property to which the city may be a party, either as

lessor or as lessee, whenever he shall find it necessary to secure private property for the use of the city, or whenever it is deemed advisable that the property of the city should be leased; provided, that no lease to run for more than two years shall be executed without the special approval of the City Council."

It will be seen from the above that the comptroller has authority, without making application to the City Council, to rent such premises as he deems necessary for the use of the city subject to the statutory provisions relating to an antecedent appropriation, and the further provision stipulated in the ordinance to the effect that no lease entered into by him shall be for more than two years without special approval of the City Council. The authority to make such leases having been placed in the hands of the comptroller, the right to pay rent is necessarily implied. Since the appropriation is sufficient to cover such rent, it follows that the comptroller has the legal authority to use such part of same as is necessary to pay the rent.

Section 36 was undoubtedly intended as a means of providing necessary quarters for the various departments where space outside of municipal buildings was required. If the Department of Public Welfare could be accommodated in the City Hall, no such question as you have presented could arise.

Inasmuch as it was necessary to seek outside quarters, it is for the city comptroller to designate where the department should be located and to provide for the payment of rent, always bearing in mind that this can be done only where there is a sufficient antecedent appropriation to take care of same.

We are of the opinion, therefore, that if in your judgment the space occupied in the two buildings is necessary in order to carry on the activities of the Department of Public Welfare, you have a right to draw on the general appropriation for rents in order to pay the rent of such premises.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Liability for Bursting of Water Pipe.

June 10, 1918.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Your letter of June 4th attaching claim of Rose Longini in the sum of \$284.14 for damages alleged to have been sustained by reason of the bursting of water pipes in her building described as 1626 and 1628 Prairie avenue was referred to the undersigned.

From the report accompanying the claim it appears that the premises in question consisted of a three-story brick building constituting two separate residences joined with a party-wall and each having stable accommodation on the rear of the lot.

It is alleged that two different notices were sent to the water department requesting that the water be shut off. Upon receipt of the first notice the superintendent of water found upon investigation that the stable in the rear of 1628 was occupied and that the sprinkling attachment on the service pipe of the property was used for sprinkling the property at 1626 Prairie avenue. Therefore, the property not being entirely vacated the water was not shut off.

During the winter of 1916 and 1917 the water in the pipes within both premises burst, causing the damage and expense complained of.

The report shows that the plumbing of both residences was supplied with shut-off valves inside of premises for the purpose of draining the plumbing to prevent freezing. This being true, even if it be admitted that the superintendent of water failed to shut off the water, the owner having neglected to shut off those drain valves under her control, freezing and bursting would have been the result, the premises being vacated and devoid of heat. Furthermore, there is no record of any notice to the Water Department to shut off the water at 1626 Prairie avenue. This being true, the Water Department would not on its own initiative shut off the water from this number.

On the proposition of negligence greater latitude is extended to municipalities than to individuals. The fact that the municipality supervises and supplies water does not in itself render it liable for every accident that may occur by reason of failure to act expeditiously upon receipt of notice. In the present case there were intervening circumstances which called for the exercise of judgment on the part of the representative of the city. It was the duty of and incumbent upon the owner to have shut off the drains within the building, in which event the pipes in question would not have frozen.

In view of the attending circumstances we are of the opinion that the municipality is in no way to blame for the bursting of the water pipes and we must therefore disclaim liability.

Very truly yours,
ALFRED O. ERICKSON,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

**War Tax on Money Collected from Bathers at Municipal
 Bathing Beaches.**

June 14, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

The letter submitted by the secretary of the Bureau of Parks, Playgrounds and Bathing Beaches asking to be advised as to whether the city is subject to war tax on money collected from bathers at the municipal bathing beaches was referred to the undersigned.

The inquiry was no doubt prompted by that part of Section 700 of the War Revenue Act of 1917 which reads as follows:

“Sec. 700. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected and paid, (a) a tax of 1 cent for each 10 cents or fraction thereof of the amount paid for admission to any place, including admission by season

ticket or subscription, to be paid by the person paying for such admission: *Provided*, That the tax on admission of children under twelve years of age where an admission charge for such children is made shall in every case be 1 cent; * * *."

The writer is informed that the moneys collected from bathers at the municipal beaches are not admission fees in the sense that a person would have to pay a fee to enter the buildings or grounds, but that they are in fact a charge for services. Anyone who comes to these beaches in bathing costume can have access to the water, mingle with the other bathers and enter the bathhouses without paying a fee.

The charge exacted is for the service rendered. That is to say, the fee is for the use of the locker and towel. There is no more reason for regarding this an admission fee than it would be to look upon the charge for rental of a bathing suit as an admission fee. In this respect the municipal bath houses at the beaches are different from some private ones where a charge is exacted for entering the premises.

Such being the case, we do not find it necessary to discuss the question of the rights of municipalities in reference to exemptions from the war tax, so far as the particular point inquired about is concerned. The provision for an admission fee tax is clearly not applicable to such a charge for services as is collected from bathers who avail themselves of the facilities afforded by the city at these beaches.

Very truly yours,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Liability of City in Excess of Contract Price.

June 20, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter dated May 2nd in which you request an opinion as to the liability of the city to the

E. Keeler Company arising out of the installation by the latter of Burke furnaces in place of McClave-Brooks Shaking Grates in the boilers at the 22nd street pumping station which were installed by said company under a contract with the city entered into on the 15th day of December, 1913.

The reports submitted to your committee by the commissioner of public works and by your staff show that the boilers installed under the contract in question at first failed to comply with the tests therein prescribed, and that, certain alterations having been made by the company, the Board of Experts appointed under the provisions of the contract later found the boilers to be technically in compliance with the test requirements, although the practical operation of the boilers continued to prove unsatisfactory.

The contract provides:

"All material used and all labor performed shall be subject to the inspection and the approval or rejection of said commissioner, and the City of Chicago hereby reserves to said commissioner the right finally to decide all questions arising as to the proper performance of this contract."

Under this provision the commissioner of public works possesses the power to finally determine whether or not there has been compliance with the contract, and the boilers having failed to meet the tests prescribed by the contract in their practical operation, the boilers were not accepted. Thereupon the company proposed the installation of Burke furnaces in place of McClave-Brooks Shaking Grates and this was permitted by the commissioner, but no undertaking was made that any additional consideration should be paid to the company by reason of the alterations made.

The contract contains the following guaranty, which shows very clearly that it was contemplated that the contractor should make any repairs or alterations necessary for the purpose of preventing defective operation:

"The contractor shall guarantee the boiler installation, appurtenances and accessories against defects of design, material or workmanship for a period of one year after date of final acceptance."

“He shall make, without expense to the city, any repairs, renewals or alterations required by reason of defects of design, material or workmanship, ordinary wear and tear excepted, during a period of one year after the date of final acceptance.”

The contract further provided as follows:

“The right is reserved to the City of Chicago, through its commissioner of public works, to make alterations in the plans or specifications for the work included herein. Should it become proper or necessary, however, in the execution of the work, to make any alterations which will increase the expense, said commissioner of public works shall report to the City Council the nature of such alterations and his estimate of the amount by which the expense to the city should be thereby increased. The amount by which the contract price shall be increased in consequence of such alterations shall be determined by the City Council.”

It is apparent that under this provision no obligation can arise against the city for any sum in excess of the contract price, except with the approval and authorization of the City Council.

In view, therefore, of the fact that the representatives of the city did not promise the contractor any additional consideration by reason of the change made in the boilers, for the purpose of remedying the defects appearing in their operation and thus complying with the contract, and also in view of the provisions of the contract which prevent any liability on the part of the city in excess of the sum stipulated in the contract, it is clear that the contractor has no legal claim against the city for the sum now claimed.

Very truly yours,

RALPH G. CRANDALL,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Payment of McGovern Judgment from Vehicle Tax Fund.

Chicago, June 22, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You submitted to us a communication from Messrs. Landon & Holt, attorneys for M. H. McGovern, concerning the judgment obtained by them against the city for the sum of \$114,714.80, with a request for an opinion as to the legality of paying same out of the Vehicle Tax Fund.

We regard the judgment as properly chargeable to the Vehicle Tax Fund, and believe it would be more proper to pay same from that fund than out of funds obtained through the tax levy. Our reason for this is the fact that the Supreme Court regarded the appropriation as having been made therefrom.

One of the questions at issue in the case in which the judgment was secured was whether there had been an antecedent appropriation. The City Council made an appropriation in the following language:

“For repair of streets in addition to the sums above appropriated, all income from the vehicle tax collected under provisions of an ordinance passed February 2, 1908, after deducting therefrom the cost of collection.”

The city took the position that the above did not in fact appropriate any sum from which funds could be drawn to pay the contractor. The Supreme Court, however, held otherwise, saying:

“In this connection it was shown that pursuant to an amendment to the Cities and Villages Act approved December 31, 1907, and in force on the same date, the city was empowered to license all wagons and other vehicles conveying loads within the city, the license fee, when collected, to be kept as a separate fund and used only for paying the costs and expenses of street and alley improvements or repairs. Thereafter, on February 2, 1908, the City Council passed a vehicle license ordinance

fixing the license fees on vehicles in the City of Chicago, and provided, among other things, that all revenues derived from such license fees shall be kept as a separate fund and used for paying the costs and expenses of street and alley improvements or repairs, fifteen per cent of the total revenues to be expended, in the discretion of the commissioner of public works and under his direction, for the repair of streets upon which there is an unusually heavy amount of traffic, the remaining eighty-five per cent obtained from each ward (as in the discretion of the commissioner of public works shall be needed for immediate use) to be expended, under the direction of said commissioner, for the repair of streets and alleys in such ward, the balance thereof to remain to the credit of such ward account, to be used as occasion required. It was clearly the intention of the City Council, in the appropriation ordinance of February 21, 1908, to appropriate the license fees collected to the repair of streets, and this was what the statute provided should be done with such fees. It is not essential to the validity of an appropriation of money that it should be for an amount certainly ascertained prior to the appropriation. *People v. Miner*, 46 Ill. 384."

McGovern v. City of Chicago, 281 Ill. 264.

From the above it will be seen that the Supreme Court looked upon the contract as one that had been appropriated for from the Vehicle Tax Fund. Such being the case, the money may now be withdrawn from that fund by an appropriation designed to pay the judgment. The mere fact that the obligation is now in the form of a judgment does not prevent the use of the fund from which it was originally to be drawn in making payment.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Vacation of Streets and Alleys.

June 24, 1918.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

For many years the practice has prevailed in your Honorable Body of passing ordinances vacating parts of streets and alleys no longer needed for public use, upon the condition that the person or corporation to whose benefit such vacation particularly inures shall pay to the city a sum of money by way of compensation. Our information is that the city has received several million dollars on this account.

Our understanding is that substantially all of these ordinances state that the money so paid is in each instance paid "toward a fund for the payment of any and all damages which may arise from the vacation of said" street or alley, as the case may be; although some of the ordinances contain a further provision that the person or corporation paying the money shall not be entitled to recover any of it.

Recently suits have been brought against the city to recover the amounts so paid on the theory that the same were paid, as stated in the ordinance, toward a fund for the payment of damages, and no claims for damages having been presented within five years, the person or corporation who paid the money is entitled to recover the same from the city.

In the case of *Lockwood & Strickland Co. v. City of Chicago*, 279 Ill. 445, which came before the Supreme Court on the face of the ordinance, the court on page 449 said:

"We are not impressed by the argument that the public interest was served by the receipt in the city treasury of the sum of \$2,694 for its action in vacating the alley. Whether the alley was no longer needed for public use and whether the public interest would be subserved by its vacation could not be made to depend on how much the city could get for its action. The

legislative powers of a city must be exercised for the public benefit, but that does not authorize a municipality to sell or bargain legislation as a means of obtaining revenue. It will be a novel proposition to hold that a city, as a condition precedent to the exercise of its lawful power and authority to vacate a street or alley no longer needed for public use, could demand and receive from private parties a sum of money for its action. Such a holding would be dangerous in principle, contrary to good morals and against public policy."

Since that decision we have endeavored to set up by way of defense that the recital in the ordinance that the money was paid toward a fund for the payment of damages was in fact untrue and that such money was in reality paid as compensation for the vacation. Both Judge David and Judge Gridley of the Superior Court have held that the city would not be permitted to set up such defense and have accordingly directed verdicts in favor of the plaintiffs in the cases before them for the amount they respectively paid the city.

We have, for the city, appealed from the judgments in these cases to the Appellate Court and that court probably will pass upon the questions involved some time next fall or winter.

Other similar cases are pending in the lower courts.

We direct the attention of Your Honorable Body to the above situation, so that you may understand the views of the courts as to the propriety of vacating streets and alleys for compensation and the danger there is that the city may have to refund all moneys received by it for such compensation under the form of ordinance now in use.

Very truly yours,

CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Board of Education Tax Warrants.

Chicago, June 24, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter in which you ask for advice concerning the approval and issuance of Board of Education tax warrants drawn against the levy for educational purposes for the year 1917.

It appears that you have before you such warrants to the extent of \$1,700,000, from the proceeds of which you are expected to pay the regular monthly pay-roll on June 28th and the teachers' salary increases from January 1st to date. These warrants are signed by Edwin S. Davis, as president, and Albert H. Miller, as secretary, of the Board of Education. You asked for an opinion because you learned unofficially that a decision had been rendered by the Supreme Court which may affect the status of these officers.

We are of the opinion that the warrants in question are valid and may be paid regardless of the final outcome of the litigation involving the title to the offices in controversy.

The law is well settled that there can be a *de facto* corporation as well as *de facto* officers of a corporation. To constitute a *de facto* corporation such as this there must be a law under which it might lawfully be organized, an attempt to organize thereunder, and actual user of the corporate franchise.

Tulare Irrigation District v. Shepard, 185 U. S. 1-13.

Imperial Bldg Co. v. Open Bd. of Trade, 238 Ill. 100-107.

All these elements are present in this instance. The law provides for the formation of a corporation to be known as "Board of Education of the City of Chicago." The persons who were named by the mayor as members at least attempted to organize the corporation—this is true even if it should ultimately be held that they were not lawfully appointed to the positions which they occupy. Finally, corporate func-

tions were actually exercised. There can, therefore, be no question as to the existence of a *de facto* corporation.

The law concerning the validity and binding effect of acts of *de facto* officers is equally well settled. The rule in regard to this is that where persons are actually in possession of offices under color of authority they are the officers *de facto* and their acts bind the corporation. While authorities are so numerous on this point that we do not regard it as necessary to dwell at length on the subject, we will call attention to two cases which clearly support our view.

In the case of *Leach v. People ex rel. Patterson*, 122 Ill. 420, there were only five members of a Board of Supervisors elected under an act which afterwards proved to be unconstitutional, and they performed functions which should have been performed by fifteen members elected under another law. Yet their acts were held to be valid and binding.

In *Samuels v. Drainage Commissioners*, 125 Ill. 536, the court held that, although the validity of a certain clause in the statute providing for the election of drainage commissioners was attacked, it was unnecessary to discuss that phase of the case, saying (p. 540):

“There being such an office, and petitioners having assumed the duties of such office, and are now acting commissioners of the drainage district, they are *de facto* officers, and their official acts will be held to be valid until their right to exercise the duties of such office is called in question by *quo warranto*, and they shall be dispossessed of all power under the statute.”

In the case presented here the Board of Education, pursuant to the provisions of Section 132 of the School Act, requested the City Council to order the issuance of tax anticipation warrants. The City Council acted on this request and passed the order. All this was done before the recent opinion of the Supreme Court was handed down. Under these circumstances the warrants can be issued as in pursuance of valid and binding acts of the two bodies.

It is not necessary, in view of the above to go into the question of the finality of the court proceedings. The Circuit Court held that the members of the board whom we

have designated as the *de facto* members of the Board of Education were the rightful members. This ruling was affirmed in the Appellate Court, and until the mandate of the Supreme Court reversing same is filed in the Circuit Court, it stands as the ruling of the court. Notice of a petition for re-hearing has been prepared for service and a re-hearing will undoubtedly be applied for. It may be that the Supreme Court will never issue a mandate reversing the decision of the Circuit Court. Hence, there is another reason for treating the act of the present Board of Education and the act of the City Council in furtherance thereof as valid. The cause is still pending, it has not been finally disposed of, and the status prevailing during the past year, during all of which time this board was recognized as the Board of Education, has not been disturbed—in fact the *status quo* cannot in any event be disturbed until after the Supreme Court passes on the petition for re-hearing.

Consequently we look upon the warrants before you as lawfully issued.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Signature of Payrolls, etc., by Assistant City Physician.

June 28, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether it would be proper for you to honor payrolls, requisitions, etc., signed by Dr. Lewy, assistant city physician.

You state in your letter that the city physician, Dr. C. W. Leigh, has left the service of the city and entered the army, that he left the office in charge of Assistant Physician

Lewy, with written authority to sign his name to all papers and documents pertaining to the business of the office, that Dr. Lewy has forwarded this written authority to you, and that you are in doubt whether the delegation of such authority may legally be recognized by you.

If Dr. Leigh had actually left the service of the city he could not confer authority on a subordinate to act as to such matters, but our information is to the effect that he is only temporarily absenting himself in order to do some work for the army which he expects to finish before long, when he will return and again assume the functions of his office.

The office of city physician is created by ordinance and in contemplation of law the person who occupies the position is the head of a department. It is, of course, not an unusual thing for the head of a department to absent himself temporarily, as in case of sickness, the discharge of official duties which take him away from the city, etc. While he is gone the person designated by him as the acting head of the department may discharge such purely ministerial duties as the certification of payrolls and vouchers. There is nothing in the code of the city which prohibits this, and it is the usual practice. It is done in all cases where there is no express provision of the code which designates the acting officer.

Upon further inquiry, the writer ascertained that the only reason why the auditor assumed that Dr. Leigh had left the city's service was because the payroll was presented without his name appearing thereon. This may readily be explained on the theory that he may have assumed that he would lay himself open to criticism if he drew his salary while away. Finally, his memorandum giving authority to Dr. Lewy to act in his place indicates that his absence is only temporary.

Inasmuch as the absence of Dr. Leigh is clearly not an abandonment of his office, we do not consider it necessary to discuss the effect of enlistment in the army for the period of the war, which in some cases has been held to be an abandonment of the office tantamount to a resignation (*State*

v. *Allen*, 21 Ind. 516), while in other cases it was held that the two positions were not incompatible and that the office could be retained (*Bryan v. Cattell*, 15 La. 538). We believe you will be justified in honoring payrolls, vouchers and requisitions signed under the temporary authority conferred on Dr. Lewy to act as city physician.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Filling Vacancies on Temporary Authority.

June 29, 1918.

HON. VIRTUS C. ROHM, Business Agent.

Dear Sir:

Your letter in reference to the interpretation of the order recently passed by the City Council concerning the filling of certain vacancies was referred to the undersigned for consideration and reply.

The order in question authorizes the various heads of departments named therein "to fill, at the minimum salary of the grade," the positions designated which had been made vacant by absence on military duty of former incumbents. (Council Journal, June 17, 1918, p. 421.) The inquiry you make is whether you may employ clerks to fill vacancies in your department on temporary authority at a salary above the minimum but within the grade.

In our opinion the order must be construed as re-affirming the rule laid down in the Appropriation Bill for the current year, and it does not affect temporary appointments.

In the absence of any modifying provision in the appropriation ordinance, the amounts named therein for any given employe would have to be accepted as the amount fixed for the salary. This would be in accordance with Section 3, Part 2, Article XII of the Cities and Villages Act, which provides

that "the compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council." While it is often contended that this provision of the statute should be construed so that it applies only to officers as distinguished from employes, nevertheless, it clearly indicates that the appropriation ordinance is the proper legislative act in which to fix salaries of all persons in the service of the city.

It has been the custom for a number of years, however, to place a provision in the appropriation ordinance which has the effect of reading into that ordinance the provisions of an ordinance recognizing the rules of the Civil Service Commission with respect to grades and salary groups within the grades. This appears in the current appropriation bill as Section 6, which says that the compensation fixed for "positions under civil service" shall be in accordance with the provisions of the ordinance of July 15, 1912, authorizing classification of positions, etc. (Council Journal, Feb. 20, 1918, p. 2108.)

The ordinance of July 15, 1912, from time to time was the subject of legislative action in the shape of orders aimed at a modification of the terms of same. The most recent of these was the order of March 26, 1918, appearing on pages 2498 and 2499 of the Journal, which was evidently intended to amend the original ordinance and is in the form of a revision of same.

Whether or not these orders have the legal effect of modifying the ordinance of July 15, 1912, need not be discussed here, because the result in either event is the same. That is to say, that so far as civil service positions are concerned, the compensation fixed in the appropriation ordinance is to be regarded as the maximum appropriation for the position, and when a vacancy occurs it should be filled from the eligible list, and the compensation should be at the minimum salary in the grade, with advancement possible only within the department. We say this in the face of a rather startling decision of the Supreme Court recently rendered in the case of *People ex rel. Roderick v. City*, 283 Ill.

462, in which the court seems to hold that where a position is designated by the City Council in the appropriation bill it must be filled by the head of the department, carrying with it the idea that the position is created, the salary fixed, and that the head of the department has no choice but to appoint some one at that salary.

Since all this is determined in the appropriation ordinance, the necessity for re-stating it in the order under consideration is not apparent. We understand that the reason for granting authority to employ is based on the observance of a former order directing the heads of departments not to fill vacancies. But so far as the requirement as to salaries is concerned, we cannot interpret it as meaning anything further than an affirmation of the provision that where civil service employees are appointed they shall be appointed at the minimum salary for the grade.

This rule has never been construed as applying to temporary appointments, and we see no reason why the particular order in question should operate to change the construction placed upon the provision heretofore. The head of the department is bound, under the law, to make his appointment from the eligible list, if there is one, unless there are some extraordinary circumstances which make a temporary appointment excusable. If there is no eligible list, or if for some other reason the appointment must be a temporary one, the head of the department has the right to make an appointment to fill the vacancy temporarily at the salary fixed in the appropriation bill. Neither the Civil Service Law, the rules of the Civil Service Commission, nor any ordinance of the city recognizes such a temporary appointee as a civil service employee. Hence, the provisions of the appropriation ordinance concerning appointments in the classified service has no bearing whatever on an appointment of this kind, and the terms of the appropriation are not modified as to the compensation fixed in case the place is filled by such temporary employee. In our opinion, in spite of the decision in the Roderick case, you have the right to employ at a lower salary than the one fixed, but in case you find it

impossible to secure a temporary employe for less than the salary fixed in the appropriation bill you may employ him at that salary, upon getting authority to make such temporary appointment.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Compensation for Condemned Land.

July 8, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter of June 5, 1918, by Mr. L. E. Gosselin, deputy comptroller, in regard to the right of the daughter of Henry S. Eckhardt to receive compensation awarded for certain land condemned under the law of eminent domain, has been handed to me for reply.

From the certified copy of the will of Henry S. Eckhardt of Fairbury, Illinois, recently furnished me by your office at my request, it appears that the lady in question, Mrs. Bessie Hankins, has a life estate in the property in question, a part of which was condemned, with a remainder over at her death in equal parts to her children then surviving her.

It is well settled that the payment to a life tenant of compensation awarded upon the taking of property under the law of eminent domain does not operate to satisfy the claims of the remainder-men.

In the case of *Bartlow v. C. B. & Q. R. R. Co.*, 243 Ill. 332, the court, at page 335, said:

“The natural inference is that the condemnation proceedings had resulted in the allowance of compensation for the land and that the amount allowed was paid to Mrs. Bartlow. Such payment was not effectual to vest in the railroad company the title of her children. They

were minors, and the statute directed that payment in such case should be made to the guardian, or if there were none, to the clerk of the court. She was a life tenant and was interested in the amount allowed, but her interest was not a joint interest with her children and a payment to her was not a payment to them.

"It is contended that as Mrs. Bartlow had a life estate in the whole of the land she was entitled to the exclusive use of the compensation during her life, and the payment to her was for that reason sufficient. While she had a life estate her children had the remainder, and if there was any authority at all for making payment to her, the principal of the compensation allowed should have been secured to the children after her death, before it was paid over to her. There was no authority for paying the compensation to her absolutely because it was more convenient to disregard the rights of her children than to protect them. Their title would not be vested in the corporation by payment to another person of the compensation allowed for it. Under the statute then in force, when property was taken and condemned for public use the condemnation was of the entire property, and the assessment of damages was held to be in satisfaction of all the title to the property, including the fee simple and all lesser estates. Those holding different estates in the property were left to divide the money paid as compensation for the land thus appropriated to public use, according to their several interests or estates. The fund took the place of the land and became liable to precisely the same burdens as it was under while it was land. Since it was not subject to allotment like land, it was subject to the control of a court of equity, which might, in case of the existence of a life estate, require the payment of the interest to the life tenant during life, providing for the ample security of the principal and the payment of the interest to the life tenant during the existence of the life estate and for the payment of the principal to the remainder-men after the termination of the life estate. (*Bonner v. Peterson*, 44 Ill. 253.) In this case the remainder-men were infants, incapable of agreeing upon a division of the compensation, and if the railroad company had desired to make payment of the compensation due to them, it should have taken such proceedings as would have enabled it to make payment to a person authorized to receive it. The payment to the life tenant was of no effect as to the remainder-men."

It will be readily seen that the case above cited is very similar to the matter now in question, and from the opinion of the court above given, it is very evident that Mrs. Hankins could not give a proper receipt to the city for the money awarded as compensation for property taken. As stated in the above opinion, compensation so awarded takes place of the property itself and is subject to the same burdens as the land itself was subject to.

If the children of Mrs. Hankins have all reached their majority and will give a proper receipt releasing the city from any claims which they now have or may have on account of their interest in the said property, the vouchers may be safely turned over to whatever person they indicate is suitable to them. In the event, however, that some of the children of Mrs. Hankins have not reached their majority they are under a disability because of their minority and cannot agree to allow Mrs. Hankins to receive the money for them. If there has been a legally appointed guardian for such of the children as are still minors, the guardian may give the city a proper receipt and release. If, however, no guardian has been legally appointed for the minor children, if any, it would be necessary to have a guardian appointed before the rights of the minors as remainder-men could be taken care of.

The question of the daughter being entitled to any compensation when because of restrictions in the will she was forbidden to sell any of the property, has been disposed of by the Supreme Court in the case of *Henderson v. Harness*, 176 Ill., page 302, which held in substance that any restrictions by will against voluntary alienation were not effective as to involuntary alienation. In other words, that although in this particular instance the daughter by the terms of the will could not dispose of any of the real estate as her voluntary act the restriction would not operate against any sale upon execution or in a condemnation proceeding.

Section 14 of Chapter 47 of the Statutes of the State of Illinois provides that payment of compensation adjudged may, in all cases, be made to the county treasurer, who shall, upon demand, pay the same to the party thereto entitled, taking

receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian. By virtue of the above section, payment may be made to the county treasurer and be disposed of by him under that section when the rights of the parties have been properly determined.

Upon a payment to the county treasurer all liability of the city would cease, under the ruling of the Supreme Court in the case of *City of Chicago v. Gage*, 268 Ill., page 232.

From the decisions quoted above it is my opinion that the city may hold the warrant in question until proper receipts as above indicated, are delivered to it either by Mrs. Hankins as the life tenant and the heirs as remainder-men, or their proper guardian, if any of them are minors, or the money may be turned over to the county treasurer under Section 14 of Chapter 47.

Respectfully submitted,

JOHN A. BUGEE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Appropriation for Increased Salaries of Aldermen.

July 18, 1918.

HON. JAMES T. IGOE, City Clerk.

Dear Sir:

We are in receipt of your letter of recent date in which you ask to be advised as to what individuals are entitled to participate in the appropriation for the increased salary of aldermen passed June 28, 1918, and to what amount.

Accompanying your letter is a roster of members of the City Council for the last three years. The list for the period of 1916-17 is the only one which calls for a classification, the ordinance providing for the increased salary having been passed on April 7, 1916. (Council Journal, p. 4302.) With respect to the aldermen elected at the spring election in 1916, while we give the individual names, the list we present is subject to the check which your records will disclose as to

their retaining their offices during the period. We refer to the possibility of there having been deaths, resignations, etc., for which we have not searched the records.

The Constitution of the State prohibits the salaries of aldermen from being increased or diminished during their terms of office. (Article IX, Sec. 11.) Consequently the increased salary voted on April 7, 1916, cannot apply to those aldermen who were then holding office, but only to those who assumed office on April 26, 1916, and thereafter.

With the exception of Alderman Walkowiak, all the newly elected aldermen took their oaths of office on April 26, 1916. (Council Journal, pp. 1-2.) Alderman Walkowiak subscribed to his oath of office on May 11, 1916. He served as an alderman during the interim, since he held over from his former term (which began April 27, 1914) until he assumed his duties under his new election. This period of 14 days, in contemplation of law, is a part of his former term, and, therefore, he is not entitled to the increased salary during that time. (*State v. Moores*, 61 Neb. 9.)

Hence, the individuals entitled to the increased compensation for the Council year 1916-1917 are Aldermen John J. Coughlin, Hugh Norris, Ulysses S. Schwartz, John A. Richert, Thomas A. Doyle, Willis O. Nance, John N. Kimball, Ernest M. Cross, Eugene H. Block, James McNichols, Herman Krumdick, Joseph I. Novak, John G. Horne, Joseph Higgins Smith, Wm. E. Rodriguez, John Szymkowski, William J. Healy, James B. Bowler, Matt Franz, Earl J. Walker, John H. Bauler, John Kjellander, John Haderlein, Frank J. Link, George Pretzel, Oliver L. Watson, Max Adamowski, Thomas F. Byrne, Wm. R. O'Toole, Robert R. Pegram, James Rea, M. A. Michaelson, James Toman, and Thomas J. Lynch, and Alderman Walkowiak is entitled to the increased compensation for all but 14 days of that Council year, such Council year in this case being 3 days short of a full year.

At the time of the organization of the Council for the year 1917-1918 Alderman Kenna was not present. He also was a holdover, and took his new oath of office on April 30, 1917. The Council organized on April 23 of that year. There were

seven days, therefore, of the Council year 1917-1918 during which he was not entitled to the increased compensation. With this exception, all the aldermen who held office during the Council year 1917-1918 were entitled to the increased compensation for the full Council year, which appears to have been one day less than a full year.

All aldermen holding office at the present time are also entitled to such increased compensation since the beginning of the current Council year, which began on April 22. We again call your attention to the fact that we have not, in presenting the foregoing, taken into account lapses caused by deaths, resignations, etc. We believe there were several of that kind of cases. One that occurs to us is the case of Alderman Kjellander, who resigned when he assumed the office of clerk of the Superior Court, another that of Alderman Szymkowski, who died while in office. We believe, however, that what we have given above will enable you to specify with the utmost exactness the amount due to each individual alderman who has been elected to office since the passage of the ordinance providing for the increase in salary.

In response to an inquiry from the city comptroller we are preparing an opinion concerning the validity of the ordinance fixing the salary and the validity of the appropriation of June 28, 1918, in which we will pass on the questions raised on these points.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Appropriation for Increased Salaries of Aldermen.

July 18, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter concerning the appropriation for the increased salary of aldermen under the provisions of the ordinance of

April 7, 1916, was referred to the writer for consideration and reply.

You ask us to pass on the legality of the appropriation, as to when it becomes effective, if legal, and as to whether aldermen who held over in April, 1916, are entitled to the increase during the balance of that term.

With regard to the last question you ask, we have given an opinion to the city clerk holding that the salary increase applies only to those aldermen whose terms of office began after the passage of the ordinance of April 7, 1916, and we indicated therein the exact status as to each of the aldermen affected. We enclose a copy of that opinion for your information.

The ordinance changing the salaries of aldermen passed on April 7, 1916, took the form of an amendment to Section 8 of The Chicago Code of 1911. Under this section, as amended, the salaries of aldermen were fixed at \$3,500 per year.

The amendment of the code was passed pursuant to Section 14 of Article VII of the Cities and Villages Act, which was amended in 1908 in such a way as to permit such increase in salary. Under Section 3 of Part Two of the Act of 1905, usually called the "Little Charter," it was provided that "the compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council, and the compensation of no officer shall be altered during the same fiscal year."

The question was raised whether this provision or the amended Section 14 above mentioned controls, it being contended that, inasmuch as the Little Charter applies specifically to the City of Chicago, that must be taken as the law for this city in preference to the amended Section 14. We do not think this contention has much force, because the amendment to Section 14 permitted a salary of \$3,500 per annum for aldermen only in cities of more than 350,000 inhabitants, thereby indicating clearly the intention of the Legislature to have the same apply to the City of Chicago.

Hence, the ordinance of April 7, 1916, making the change in salary, was a valid enactment, and fixed the salary for the position regardless of appropriations then or subse-

quently made. It would have applied at once to all aldermen if it had not been for the constitutional provision which prevented such increase from taking effect until the terms of the aldermen then in office had expired.

Taking up the question of the appropriation, we find that the sum of \$87,500 was appropriated from miscellaneous receipts for the year 1918 for the purpose of paying the amounts due for salaries of aldermen under the provisions of the ordinance of April 7, 1916, in addition to the amounts already paid. Such an appropriation is lawful when passed by a vote of two-thirds of all the aldermen, as this was, under the terms of Section 2 of Article VII of the Cities and Villages Act as amended in, 1915, which permits such additional or supplemental appropriations within the first half of the fiscal year.

It has been suggested that this appropriation ordinance did not become effective because it was not signed by the mayor before the first of July, but we do not believe there is much to this point, since the precise question raised has been decided by our Supreme Court in favor of the validity of such an appropriation.

King v. City of Chicago, 111 Ill. 63,

People v. C. B. & Q. R. Co., 266 Ill. 150.

The appropriation not having been vetoed by the mayor before the close of the next regular meeting held on July 8, 1918, which was more than five days after its passage, it only needed publication in accordance with Section 3 of Article V of the Cities and Villages Act to make it effective. This section requires ten days to elapse after publication before it takes effect.

We are informed that the ordinance making the appropriation was duly published, and as soon as the ten days have expired the appropriation will be effective.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Publication of Pictures of Crippled Children in Public
Schools.**

July 18, 1918.

HON. JOHN DILL ROBERTSON, President, Municipal Tuberculosis Sanitarium.

Dear Sir:

Your request for an opinion as to the right of the sanitarium to publish pictures taken of the crippled children of the Spaulding School in the monthly bulletin published by the sanitarium, received.

Upon the statement of the following facts we submit the following opinion:

The Spaulding School is a public school maintained by the Board of Education for the benefit of crippled children. All expenses for the educational department of said school are defrayed by the Board of Education the same as all other public schools in the City of Chicago. The medical treatment of the children is furnished by the Municipal Tuberculosis Sanitarium, assistants, doctor, nurses and medicine free of cost to the children and their parents. It is therefore, in every way, a public institution.

The photographs that you wish to publish are made in groups and were taken for the purpose of showing the work done by the Municipal Tuberculosis Sanitarium toward stamping out tuberculosis in the city and relieving the suffering of the inhabitants. The municipal bulletin in which you desire to publish these pictures is issued regularly each month by the sanitarium and distributed to doctors, charitable and educational institutions to keep the public informed of this work.

In Hurd's Revised Statutes, 1911, Chapter 38, Page 793, Section 177, we find:

“§177. A libel is a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or publish *the natural defects* of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury.”

In Hurd's Revised Statutes, 1911, Chapter 38, Page 852, Section 518, appears the following:

"518. SUCH EXHIBITIONS UNLAWFUL.) § 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That it shall be unlawful for any person or persons, company, firm or corporation to publicly exhibit for pecuniary gain persons who have become conspicuous through some criminal act, which has a tendency to degrade human morals, to exhibit their pictures or any article which appertain to them in their attainment of criminal notoriety and to exhibit persons whose deformity is such as to attract public curiosity."

These are the only statutes we have in Illinois pertaining to this subject, and I have carefully investigated the Supreme Court decisions and am unable to obtain any further information on this question.

The question arises as to whether the publication of these pictures would in any way be harmful to the children or to their parents. This publication is not malicious because similar publications are being constantly produced by other public institutions and it is done for the purpose of informing the public where and in what manner and by what method children may find relief and be treated without expense while they are being educated.

In no way does it appear that it would expose any of the children who might be in said group to public hatred, contempt, ridicule or financial injury, as the names and addresses of the subjects in the picture are not given and as they are grouped together and not singled out individually.

We are of the opinion that the Municipal Tuberculosis Sanitarium has the authority and power to publish these pictures as far as the law is concerned. As to the question of the policy of publishing them, that is a matter for the Board of Directors to determine.

Very truly yours,

ARTHUR B. MCCOID,
Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,
Acting Corporation Counsel.

Rogers Park Pumping Station.

July 23, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works:

Dear Sir:

Pursuant to your request, we are submitting herewith draft of ordinance authorizing you to make application for the granting of a permit for the erection of a protection pier at the Rogers Park Pumping Station. This ordinance is drawn in accordance with the recommendation of the Department of Public Works and Buildings of the State under date of January 10, 1918.

By the drawing of this ordinance we do not wish to be understood as approving the ordinance as to its legality, nor do we wish to be understood as approving the practice of waiving our rights to the submerged or made lands caused by the erection of this pier. We believe that the provisions of the statute creating the Department of Public Works and Buildings and vesting in said department the power;

(Laws of Illinois 1917, pp. 24-25)

“2. To exercise the rights, powers and duties vested by law in the ‘Canal Commissioners,’ their officers and employes;

“3. To exercise the rights, powers and duties vested by law in the Rivers and Lakes Commission of Illinois, its officers and employes;

“4. To exercise the rights, powers and duties, vested by law in the Illinois Water-way Commission, its secretary, chief engineers, its other officers and employes;”

did not grant to said department the authority herein proposed to be exercised. The provision of the statute governing encroachments contained in Chapter 19 of Hurd's Revised Statutes, 1915-1916, pages 145 to 172, has no reference to the erection of piers by the City of Chicago, but we are of the opinion that under the provisions of Section 75 of Chapter 19 of Hurd's Revised Statutes, 1915-1916, pages 158 and 159, which provides as follows:

“Nothing in this act contained shall be construed to apply to any harbor, pier, break-water or other structure now or hereafter erected, maintained or operated under

authority of law by any city, village, incorporated town or park board in or adjacent to the shore of any navigable lake. * * * Upon the completion of any harbor, pier, break-water or other structure by any city, village, incorporated town or park board, in or adjacent to the shore of any navigable lake, the corporate authorities thereof respectively shall file with said Rivers and Lakes Commission a certified copy of the plans thereof,"

the City of Chicago is exempted from the terms of said statute and that it is only necessary for the City of Chicago to file plats showing the work that is contemplated. The provisions of the statute governing encroachments are directed against the encroachment on navigable waters by private owners and have no reference to a municipality carrying on a municipal work and erecting structures for the protection thereof.

We are returning herewith the draft of ordinance requested, to which should be attached a copy of plat showing location of proposed protection, together with plan of details.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Demand of Retired Members of Police and Fire Departments
for Increased Pay for Portion of Year Served by Them.**

July 24, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication of recent date informing us that a number of policemen and firemen left the services of the city during the months of January and February of this year after having served only one or in some cases a few days, and that a large number of these men retired from active service to become pensioners, but that a considerable number of them left the service for the purpose of

entering the military service of the United States by enlistment or through draft, and that they are now making requests for the increased rate allowed to a portion of the force in the annual appropriation bill of 1918, and requesting us for an opinion as to whether or not members of the police and fire departments who left the service during the months of January and February are entitled to be paid at the increased rate of wages allowed their department for the time they served in the department during January and February of 1918.

In reply, we beg leave to advise you that on January 14, 1918, the City Council passed an ordinance authorizing the payment of salaries and current expenses during the month of January, 1918, and until the passage of the appropriation bill for 1918, and Section 1 of said ordinance provides, in part, as follows:

“Section 1. That the city comptroller and city treasurer be and they are hereby authorized and directed to pay to the several officers and employes of the City of Chicago, including the Chicago Public Library and Municipal Tuberculosis Sanitarium as salaries and compensation respectively, including ward activities, for the month of January, 1918, and until the passage of the 1918 appropriation bill, the amount per month authorized to be paid for the fiscal year ending December 31, 1917. * * *

The annual appropriation bill was passed by the City Council on February 20, 1918, and the annual salaries of all employes in the police and fire departments of the City of Chicago were fixed in said annual appropriation bill. Up to the time of the passage by the Council of the annual appropriation bill for the year 1918 the salaries of all employes in the police and fire departments of the city were as fixed by the ordinance passed on January 14, 1918, and employes of the police and fire departments who resigned from the service of the city for any cause whatsoever prior to February 20, 1918, are not entitled to receive the benefits of any increase in wages provided by the annual appropriation bill passed February 20, 1918.

In our opinion, the increase in wages as provided by the annual appropriation bill for members of the police and fire

departments cannot legally be paid to any employe of either department who resigned from the service prior to the passage of the annual appropriation bill which, as we have stated, was passed by the Council on February 20, 1918. If any of the persons referred to in your communication remained in the employ of the city until after February 20, 1918, they are entitled to and should receive pay from January 1, 1918, in such sum as may be fixed in the annual appropriation bill for the position or rank they held in either the police or fire department. Any employes of the police or fire department who resigned prior to February 20, 1918, the date on which the appropriation bill was passed are, in accordance with the provisions of Section 1 of the ordinance passed January 14, 1918, only entitled to pay at the rate fixed in the appropriation bill of 1917 for the rank or grade held by them in the department in which they worked.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Liability of the Municipal Tuberculosis Sanitarium for Rent
of the Southwest Dispensary.**

July 29, 1918.

HON. JOHN DILL ROBERTSON, Pres. Municipal Tuberculosis
Sanitarium.

Dear Sir:

Yours received relative to the question of the liability of the sanitarium for rent of the Southwest Dispensary after the expiration of the lease, from December 1, 1917, to April 30, 1918.

On the following statement of facts, we submit the following opinion:

The Municipal Tuberculosis Sanitarium, by its Board of Directors entered into a one year lease with the owner of

the premises known as 2406 and 2408 West 22nd street, which expired on April 30, 1917. There is no notice on the part of the landlord or the tenant to terminate this lease at the expiration of the lease. The Municipal Tuberculosis Sanitarium continued to occupy these premises as a dispensary, and paid the monthly rental of \$55, which was the same monthly rental paid under the terms of the lease. The agents and the landlord accepted this monthly payment, and receipted therefor. The Municipal Tuberculosis Sanitarium vacated the premises on or about November 30, 1917. The lessor has been unable to release the premises since. The question of the liability of the tenant to pay rent for the premises when holding over after the expiration of the lease is well established in the State of Illinois. It has been decided a number of times by the Supreme Court of the state. A tenant holding over under these circumstances by implication of law becomes a tenant for another full year, and a municipal corporation is no exception to the rule.

Clinton Wire Cloth Co. v. Samuel S. Gardner, 99 Ill. 157.

Condon v. Brockway, 157 Ill. 94.

“When a tenant for a year or years holds over with the consent of his landlord, the law will, in the absence of other facts, imply a renewal of the tenancy for another year upon the terms of the former lease, so far as applicable. The tenant by holding over signifies his desire to continue in the occupation of the premises, and the landlord, by claiming rent or otherwise, signifies his assent. *Clapp v. Noble*, 84 Ill. 62.”

Therefore, the sanitarium is liable for the payment of this rent to the thirtieth day of April, 1918. However, the agents of the lessor made a proposition of settlement for the sum of \$165.00. We recommend that this offer be accepted.

Yours truly,

ARTHUR B. McCOID,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

**Application of Funds from Bond Issue for House of Shelter
and Farm Colony.**

August 1, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your letter of recent date concerning the expenditure from the bond issue for the purposes of the Farm Colony, to which was attached a letter from the House of Correction, was referred to the writer for consideration and reply.

The City Council on March 26, 1918, made an appropriation of \$50,000 out of the bond fund in question for the construction of a House of Shelter and a further appropriation of \$200,000 for "property and buildings for establishing a Farm Colony" (Council Journal, March 26, 1918, page 2495).

The superintendent of the House of Correction inquires now of your committee whether he is authorized to draw upon this appropriation for the purpose of buying farm implements, stock, repairing old buildings or anything else that he may need in making the tract of land about to be improved suitable for the purposes of a Farm Colony and House of Shelter.

We do not believe that either the appropriation or the ordinance authorizing the issuance of bonds contemplates the expenditure of the money for any other purpose than the acquisition of a site and the construction of buildings. The ordinance providing for the bonds was passed on March 1, 1915 (Council Journal, page 3767). Section 1 of said ordinance states that the bonds authorized are "for the purpose of constructing a House of Shelter for Women and acquiring a site and constructing buildings for a Farm Colony for the House of Correction." The bond itself states that it is issued for the same purposes. This cannot be construed as authorizing the purchase of equipment or even for maintenance and repair of buildings, although we believe that it would be within the purview of the ordinance in case old buildings that had been used for other purposes were

converted so as to put them in condition for use in connection with the Farm Colony. Such a change in buildings could be properly construed as coming within the authority to construct buildings for this purpose, but that is as far as such authority extends.

In view of the express terms of the ordinance authorizing the issuance of these bonds, the appropriation made by the City Council must be interpreted as a setting aside of funds for the purpose of acquiring land and constructing buildings thereon for the purpose of a Farm Colony.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Rights of the City in Connection With Streets Dedicated.

August 3, 1918.

HON. GEORGE F. ILIFF, Chairman, Compensation Committee
of the City Council.

Dear Sir:

Your letter of July 19, 1918, requesting an opinion of this office, with reference to a settlement of certain suits now pending in the Circuit Court of Cook County to quiet title to certain property in Leather's Subdivision of the North ten and one-quarters ($10\frac{1}{4}$) acres of the West half ($W. \frac{1}{2}$) of the Southeast quarter (S. E. $\frac{1}{4}$) of the Southeast quarter (S. E. $\frac{1}{4}$) of Section Thirteen (13), Township Thirty-nine (39), Range Thirteen (13), to which suits the City of Chicago is party defendant, has been handed to me for reply.

The opinion of this office written December 15, 1916, to the Honorable William R. Moorhouse, Commissioner of Public Works, is in my judgment a correct conclusion as to the rights of the city. As therein set out, the taking of possession of the streets and alleys for the purpose of making public improvements amounts to an acceptance of the dedi-

cated property by the city, and upon such acceptance the city holds the said streets and alleys in trust for the use of the public and a mere non-user on the part of the city, no matter how long continued, does not deprive the city as the representative of the public of the right to take possession at any time.

Consumers Company v. The City of Chicago, 268 Ill. 113.

Shirk v. The City of Chicago, 195 Ill. 298.

Village of Lee v. Harris, 206 Ill. 428.

The occupancy of any person holding adversely to the city, no matter how long continued, cannot affect the right of the city to take possession whenever it sees fit, unless as is said by the Supreme Court in the case of *Shirk v. The City of Chicago*, above cited, at page 314, it be prevented from doing so on the theory of an estoppel, and such theory can only arise as a means of preventing injustice or fraudulent results where the acts of a municipality have induced a change of conduct in the complaining party. Citing *City of Chicago v. Sawyer*, 166 Ill. 290. No affirmative act by the City of Chicago, such as would give those holding adversely to the city the right to claim an estoppel, appears to have taken place in this case, so that there can be no justification on the part of adverse holders for a claim that the city is estopped to assert its right to possession of the alleys in question. The question of levying a special assessment by the city upon the alleys alleged to have been vacated does not change the position of the city with reference to its right to possession of the alleys as trustee for the use of the public. While the question has never been squarely decided in the State of Illinois, there are numerous decisions of other states which hold that the payment of taxes by an individual will not constitute an abandonment of streets and alleys or other public property by a municipal corporation.

Wilder v. St. Paul, 12 Minn. 192.

Busse v. Central Covington, 39 So. Western 848.

Seattle v. Hinckley, 67 Wash. 273.

Humphreys v. Krutz, 77 Wash. 152.

For the reasons above given, we are of the opinion that the rights of the city in the suits in question to possession of the alleys should be upheld, and that a failure to do so would be error, and do therefore think that a settlement for the sum of \$1,500 would not be to the best interests of the city.

I am returning herewith copy of the proposed ordinance and plat of the property in question, which accompanied your letter.

Respectfully submitted,

J. A. BUGEE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contract for Wilson Avenue Water Tunnel and Crib.

August 5, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

Some time ago we prepared for you form of a contract with the Fitz Simons & Connell Dredge & Dock Company and their bondsmen which contemplated the taking over of the balance of the work by the city. In connection with same we prepared a form of acceptance of notice and consent to be signed by the bonding company which had guaranteed for five years a certain landing platform to be constructed by the contractor authorized by a modification of the original specifications.

For some reason which we did not at the time understand, the bonding company refused to sign the form presented to them for their signature. We did not see just how it would affect the five year guaranty on a completed structure, yet we proceeded on the theory that there was a modification or change in the contract which might be set up by the bonding company for the purpose of relieving it of liability if any should accrue. For this reason we

were unwilling to recede from our position that it was necessary to have the signature of the bonding company.

We are now in receipt of another letter on this subject from the city engineer, from which it appears that the landing platform that was to be constructed under the amended specifications and which was guaranteed by the bonding company had been washed away by a heavy storm before it was completed.

This puts an entirely different aspect on the whole matter and explains why the bonding company objects at this time to sign the notice and consent or acquiescence attached thereto. It may be that it is claimed by the bonding company that no liability exists against it, and it seeks to avoid putting itself in the attitude of recognizing such liability.

We do not think, under these circumstances, that the status of the bonding company will be changed by the taking over of the work by the city. Whatever liability has accrued—if any has accrued—is fixed, and nothing can be gained by the bonding company on the one hand by refusing to sign or by the city on the other by insisting on such signature.

The contract which we drafted for the purpose of taking over the work makes the original bondsmen of the contractor parties to same and covers the completion of the work in its entirety, providing among other things that any loss that accrues to the city may be made good out of the accumulated reserve, and if that is not sufficient it must be made good by the bondsmen. Hence, it holds as against these parties even if the supplementary agreement in regard to the landing platform is ignored. If it should become necessary at any time to look to the bonding company which guaranteed the destroyed landing platform for reimbursement on account of same and it should be found that there is liability, it can be held under the terms of its bond on which the liability—if any—has already accrued.

We, therefore, recommend that the contract taking over the work be executed as drafted by us, and that for the

present the question of liability for the destruction of the landing platform be allowed to rest.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Bids for Printing Municipal Court Report.

August 5, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your letter concerning bids for printing the report of the Municipal Court of Chicago for the year 1917.

It appears from your letter that bids were solicited at a time when the appropriation was low, that five different concerns submitted bids, that it was then found that there was not sufficient money on hand in the appropriation to award the contract, and that thereupon the City Council provided for the necessary money by making a transfer of funds so that the amount in the appropriation is now sufficient.

The only question presented is whether the lowest bidder is entitled to the contract in view of the fact that at the time the bids were opened there was not enough money in the appropriation.

We do not believe that the provision of the statute requiring an antecedent appropriation before a contract is let can be extended by implication so as to render void a contract on which bids were solicited before the appropriation was made. Such an interpretation would unnecessarily hamper the city's business.

This department has gone on record as holding that bids for coal and other commodities may be solicited in anticipation of the annual appropriations for same when it is deemed advisable to secure bids before the appropriation can be

lawfully made. Hence, it follows that where the appropriation is merely short but is afterwards replenished the same rule will apply.

We think the requirements of the statute are fully met if there is a valid appropriation that may be drawn on when the contract is actually entered into even though it may have been short when the bids were opened.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Temporary Appointment in Business Agent's Office.

August 5, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Replying to your letter of recent date concerning temporary appointment of clerk in the office of the business agent, we beg to advise you that in our opinion of June 29, 1918, addressed to the business agent, we stated that the order of the City Council concerning the filling of vacancies at the minimum salary in the grade did not apply to temporary employes.

We had occasion also to go into the question of the right of the City Council to prevent appointments to fill vacancies, in former opinions rendered on this subject. The gist of these opinions is that where the head of a department is authorized by the appropriation bill to employ a person, and a vacancy occurs which he deems it necessary to fill, the order of the City Council in regard to vacancies will not prevent the head of the department from filling the place according to law.

The City Council has control of the relationship between the officers and employes of the city, subject to the terms of the Civil Service Law, but it must provide for the

status of such employes by ordinance. It cannot make an appropriation for a place and give authority to fill it in the Annual Appropriation Ordinance and then keep control over the appointment by means of an order subsequently passed.

While it is entirely proper for the heads of departments to give heed to the wishes of the Council so far as filling vacancies is concerned, the responsibility for the conduct of the city's business ultimately rests on the heads of the departments, and therefore they will be justified if they stand on their legal right to fill a vacancy according to law when the Council ignores a request made in accordance with the order mentioned above.

As to the particular place about which you inquire, we understood, at the time we gave our opinion of June 29, 1918, to the business agent, that the latter had the consent of the City Council to fill the vacancy, but that there was no eligible list, and that the only question presented was whether under such circumstances he was bound to fill the place at the minimum salary for the grade. We held that he could employ a temporary appointee at a lower salary than that fixed in the Appropriation Bill, but that if he found it impossible to secure a satisfactory temporary employe for less he had the right to appoint one temporarily for the full salary fixed therein.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Distributing Station.

August 6, 1918.

HON. SAMUEL A. ETTELSON, Corporation Counsel.

Dear Sir:

I have looked over the blue print of the Sinclair Refining Company showing the ground plan of its proposed dis-

tributing station at 22nd and Rockwell streets and have read the ordinance passed by the City Council March 21, 1918 (Journal of the Council Proceedings of said date, pp. 2447 and 2448). I have also considered the Ridge avenue proposed plant of said company wherein the conditions are practically the same as the plant shown by the blue print, and owing to the similarity of object and location of component parts for the purpose of this opinion they can be discussed as one.

The ground plan indicates that the filling station covers more than one lot on which are tanks for storage capacity of gasoline, kerosene and lubricating oils, as well as a so-called public filling station, whereby automobiles may drive in upon the premises for the purpose of filling their tanks with gasoline. Driveways are provided for permitting teams and wagons to have access to the wholesale tanks in one portion of the premises. The general plan or scheme is to provide a filling station for purchasers of gasoline in small quantities or at retail and in large quantities by wholesale. There is no difference between the business on one portion of the premises with that conducted on the other, except as is noted in the class of trade served.

The ordinance passed by the City Council defines filling stations as follows:

“SECTION 1. FILLING STATIONS DEFINED.) For the purpose of this ordinance any room, building, place, lot, yard, plant or premises, where a container or containers, tank or tanks, either portable or stationary and containing either, carbon bisulphide, gasoline, naphtha, benzole, collodion, hydrocarbon (gas drips), liquified petroleum gas, acetone, amyl, kerosene, amyl alcohol, turpentine, or other inflammable liquids are kept or located for the purpose of selling, offering for sale, or distributing any such liquids from such containers, tank or tanks, shall be deemed a filling station.”

It can be readily seen that if these two stations are upon one lot or in a single yard or comprise an entire plant that they are within the definition of a filling station, and but one license is all that is required and the amount of

the license fee shall be in accordance with the provisions of Section 3 of the ordinance as passed.

Summing up the whole matter, I can see no objection for the proposed arrangement, provided the construction of the tunnel is approved by the chief of fire prevention and public safety.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Annexation of Portion of Town of Norwood Park.

Chicago, August 6, 1918.

HON. JOHN P. GARNER, Superintendent of Public Service.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether the annexation of a portion of the Town of Norwood Park (which you speak of as Ridgemoor) was effected.

The city is enjoined at present from exercising governmental authority over the territory in question, and there has been no annexation.

The territory in question is not incorporated. Consequently it must be annexed if at all, under the law of 1872 which authorizes the annexation of unincorporated territory. This law provides that on petition in writing of a majority of the legal voters and a majority of property owners in such territory the City Council shall submit the question of annexation to the people of the city "at its next regular election or a special election to be called within sixty days after said petition is presented."

The City Council had the petition before it on July 6, 1917, and ordered the special election to be held on November 6, 1917. This was more than sixty days after the presentation of the petition and contrary to the statute. The

annexation was attacked by interested parties who raised numerous points, among which was the failure to follow the law in this respect. We considered this fatal, and did not resist the entry of a temporary injunction.

Inasmuch as the people as well as the City Council had gone on record in favor of annexation we suggested to the parties who desired annexation that the defect might be cured by preparing a new petition which could be submitted at the regular municipal election this spring. This was done, but the proposition failed to carry by a majority of all the votes cast at that election, although it had an overwhelming majority of those voting on the proposition. The statute required a "majority of all the votes cast." Hence, the defect was not cured at the subsequent election.

The court proceedings in which the temporary injunction was granted are still pending. We stated to attorneys representing the annexationists that if they could point out a way of overcoming the vital objection which we have mentioned we would endeavor to fight it out on the other points raised, but they were unable to do this. Thus, it will be seen that the territory has not been lawfully annexed to the city.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Utilization of Surplus Energy at Pumping Stations for Making Ice.

August 6, 1918.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your request for an opinion as to the right of the city to make use of surplus power at the pumping stations for the manufacture of ice and the sale of such portion of same as is not required by the municipality, we submit the following:

It appears that the amount of energy developed at the municipal pumping station between the hours of 10:00 P. M. and 3:00 A. M. is in excess of requirements. This is due in part to the immense size of the equipment and in part to the fact that it is necessary to maintain power to guard against the possibility of a fire, breaking of a water main, or other accident. During those hours such surplus energy could be employed advantageously in the manufacture of ice. There are buildings in connection with three of these stations—Harrison street, Twenty-second street and Fourteenth street—which could easily be made available for the manufacture and storage of ice.

The city requires a great deal of ice which it now purchases, and we have no doubt of the legality of the manufacture of same in this way if it is to be consumed in public buildings. The courts would probably hold that the utilization of this surplus power is for a public purpose and lawful without further legislative authority than the city now possesses. It is possible that the courts may go further and hold that the city may manufacture and sell ice to the public when the weather conditions are such that an emergency exists from the standpoint of public health.

In an opinion by a former corporation counsel under date of June 9, 1914 (Opinions of 1913-14, p. 936), it was held that the city authorities could anticipate the future needs of the municipality and provide a plant which would yield a surplus and that such surplus could be sold to the public. On the other hand there are authorities to the effect that a municipality may not manufacture articles necessary for its own lawful enterprises when such articles are in common use and are to be had in the open market. (*Atty. Gen. v. Com. Council of Detroit*, 150 Mich. 310; *Radford v. Clark*, 113 Va. 199.) The law is far from settled, and we would not undertake to say what our courts would hold except as above indicated.

A bill authorizing the city to manufacture and sell ice was passed by the General Assembly last year, but was vetoed by the governor. So far as we can learn, the governor did

not find anything contrary to the Constitution in the bill, but he deemed it unwise for the city to undertake a new venture of this kind during the war.

In construing the constitutional provisions in the various states, it has been repeatedly held that the state could not grant power to engage in enterprises generally conducted by private persons or corporations unless they were impressed with a public use. This doctrine has been carried so far that there are numerous decisions which hold that there is no power lodged in the state to authorize the purchase and sale of fuel, manufacture and sale of plumbing appliances, the maintenance of warehouses, the storage of oil and sale to the public, and there is even a recent authority (*Union Ice and Coal Co. v. Ruston*, 135 La. 898) which holds that it cannot grant a municipality authority to manufacture and sell ice. Most of these decisions seem to be based on constitutional limitations as to taxation, holding that these are not "public purposes" within the meaning of that term as used in the Constitution, but in some cases the decisions are based on different grounds.

The following are a few of the authorities which hold that the state itself has not the power to embark in such enterprises:

Opinion of the Justices *in re* fuel, 155 Mass. 601, 182 Mass. 605, 211 Mass. 624.

Keen v. Waycross, 101 Ga. 588.

Coleman v. Kelly, 71 Kan. 811.

Rippe v. Becker, 56 Minn. 100.

Union Ice & Coal Co. v. Ruston, 135 La. 898.

However, there have been a number of decisions which conflict with the above, among them being the following:

Holton v. Commilla, 134 Ga. 560.

Laughlin v. Portland, 111 Me. 486.

Schneider v. Menasha, 118 Wis. 298.

State ex rel. Lyon v. McCown, 75 S. E. 392 (S. C.).

Sun Printing Co. v. New York, 40 N. Y. Suppl. 607.

Generally speaking the last mentioned cases are more recent than those first cited. It will also be of interest to

note that Holmes, J., now on the U. S. Supreme bench, dissented from the opinion of the justices of the Massachusetts Supreme Court in the first of the opinions above cited.

Under legislative authority numerous Ohio cities now sell ice, and the City of Omaha is installing a plant for the purpose.

We do not believe the constitutional provisions concerning taxation in this state preclude the possibility of expending public money for the purpose of establishing municipal ice plants, and in view of the favorable decisions above cited we are of the opinion that if the Legislature of this state granted authority to municipalities to manufacture and sell ice the power would be upheld by our courts. As to its authority to manufacture ice for its own use we think there can be little question. Even the adverse opinion in *Union Ice Coal Co. v. Ruston*, 135 La. 898, does not go so far as to intimate that a large municipality like this may not manufacture ice for municipal purposes. In speaking of the fact that the City of New York contemplated doing that the court said: "But, we imagine, no one would contest the right of the town of Ruston to do this same thing if the town were of proper size for such a thing. But Ruston is not a city, nor even a very large town." (p. 902.)

Our conclusion, therefore, is that for purposes of municipal consumption there may be such utilization of surplus energy at the pumping stations as has been suggested, and, if it is deemed practical and advisable to do this, a test case could be made up and fought out to determine how far the city may go in disposing of its surplus.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Purchase of Ticket Office Constructed by Roosevelt Steamship Company.

August 6, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter, concerning the ticket office constructed by the Roosevelt Steamship Company at the Municipal Pier, was referred to the writer for consideration and reply.

The papers attached to your letter would seem to indicate that the Roosevelt Steamship Company originally entered into a one-year lease for the use of a portion of the Municipal Pier in 1916 and that this lease was extended for an additional year, expiring June, 1918; that prior to the expiration of the lease the company notified the city that the Steamer Theodore Roosevelt was taken over by the government, that it did not desire to renew its lease and that it was closing up its affairs and intended to remove the ticket office which it had erected on the premises in the event that the city did not care to purchase the same. Our inquiry has developed the fact that the written lease was never signed, but that fact does not change the legal aspect of the case.

It further appears as a result of negotiations entered into when the period was about to terminate the said ticket office was to be purchased by the city for \$150.00 and that a requisition for same was made, which is before you for payment. The question you ask is whether the office fixtures in question can be construed as permanent fixtures which are not removable by the tenant or whether the city is bound to pay for the same.

We find nothing in the situation which justifies the belief that it was the intention of the parties that the ticket office, constructed by the tenant, should become the property of the city. The rules of the common law with reference to trade fixtures and the statute quoted below govern the case.

It was for many years the rule in this state that trade fixtures of this character were removable by the tenant, if such removal took place while the premises were in his possession.

The case of *Baker v. McClurg*, 198 Ill. 28, is a leading case on this point. It was held in that case that certain bake ovens could be removed, thereby not only establishing the law with regard to the right of removal within the term of the lease but also covering the question of what may be regarded as trade fixtures. The ticket office in question undoubtedly comes within the definition of trade fixtures.

Prior to 1905 there were a number of cases where the right of removal hinged on the rights of a tenant in case of a renewal of the lease, and the law was that, unless such right of removal was reserved in a subsequent lease, it lapsed on the termination of the first lease. In the year 1905, however, this matter was disposed of by the enactment of the following amendment to the Landlord and Tenant Act:

“§ 35. Subject to the right of the landlord to distrain for rent a tenant shall have the right to remove from the demised premises all removable fixtures erected thereon by him during the term of his lease, or of any renewal thereof, or of any successive leasing of the premises while he remains in possession in his character as tenant.”

From the above it is clear that at present no advantage can be taken of the fact that there was a renewal of the letting or that the lease was not executed in written form, and the rights of the parties are the same as if the original lease had been in writing and had extended up to June, 1918.

Inasmuch as due notice was given to the city that if it did not purchase the ticket office in question the same would be removed, and the city in pursuance of said notice entered into an agreement to purchase, it would be improper at this time to seek to take advantage of the fact that the ticket office was not removed before the expiration of the term.

Our conclusion, therefore, is that there is no justification for withholding the money due under the requisition approved by the chairman of the Harbor and Subway Commission, and same should be paid.

We return herewith the letter of the secretary of the har-

bor board, memorandum of the investigator, the requisition, and the letter and bill of the Roosevelt Steamship Company

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lawfulness of "Athletic Carnival" Program.

August 8, 1918.

MR. L. E. MYERS, Chairman, 120 West Adams Street, Chicago.

Dear Sir:

I am in receipt of your letter of today, in relation to the athletic carnival to be held Saturday next at Comiskey Park.

If, as you state, "nothing on Saturday's program in any way violates the law," you need have no fear of police interference.

However, let me call your attention to Sections 231 to 236, both inclusive, of the Criminal Code of the State of Illinois, which read as follows:

"231. SENDING CHALLENGE—TRAINING FOR.) Sec. 231. Whoever sends, publishes or causes to be sent or published, or otherwise makes known, any challenge to fight what is commonly known as a prize fight, or shall accept any such challenge, or cause the same to be accepted, or goes into training preparatory to such fight, or acts as trainer for any person contemplating any participation in such fight, or witnesses such training or engages as a witness in any such fight, shall be confined in the county jail not exceeding six months, and fined not exceeding \$500. (L. 1869, p. 307, Sec. 1; p. 112, Sec. 3.)

"232. ENGAGING IN.) Sec. 232. Whoever, by previous appointment or arrangement, meets another person and engages in a prize fight, shall be imprisoned in the penitentiary not less than one nor more than ten years. (L. 1869, p. 307, Sec. 1; p. 112, Sec. 3.)

"233. AIDS, SECONDS, ETC.) Sec. 233. Whoever is present at such fight as an aid, second or surgeon, or advises, encourages or promotes such fight, shall be im-

prisoned in the penitentiary not less than one nor more than five years, or be confined in the county jail not exceeding one year and fined not exceeding \$1,000. (L. 1869, p. 307, Sec. 1; p. 112, Sec. 3.)

"234. LEAVING THE STATE TO FIGHT.) Sec. 234. Whoever, being an inhabitant or resident of this state, by previous appointment or engagement made therein, leaves the state and engages in a fight with another person without the limits thereof, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding \$5,000. (L. 1869, p. 112, Sec. 3.)

"235. SPARRING AND BOXING EXHIBITIONS.) Sec. 235. Whoever instigates, carries on, promotes or engages in as a witness any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months. (L. 1869, p. 307, Sec. 2.)

"236. PREVENTING.) Sec. 236. Any person who shall, upon complaint made before any judge or justice of the peace, appear to be about to engage in any such fight or sparring or boxing exhibition, may be compelled to enter into bond with security to keep the peace, as in other cases of threatened breaches of the peace."

For years, and more especially since the war began, many persons, on a variety of pretexts, have attempted to evade the above law and promote in Chicago prize fights and sparring or boxing exhibitions. But the city officials who are charged with the enforcement of the law have refused to allow such exhibitions to be held.

This situation has been fully explained to you many times and you have been told that prize fights and sparring or boxing exhibitions would not be permitted in this city.

You were also told, as the fact was, that I had taken this matter up directly with the secretary of war and the secretary of the navy; that I had received no reply from the secretary of war, but that I had received from the Navy Department a communication reading as follows:

"The bureau has received, by reference from the secretary of the navy, your letter of July 2, 1918, with reference to correspondence relative to boxing bouts planned as part of the Elks program on July 6th.

"It appears from the correspondence that bouts of this character are prohibited by the state laws of Illinois,

and the Navy Department of course does not wish to take any action in matters of this kind which would be inconsistent or in violation with state laws."

Notwithstanding all this, you have proceeded to advertise the carnival for next Saturday and to cause tickets for admission thereto to be sold, on the assumption that some way or other you would be permitted to violate the state law.

Hence, your alleged surprise at the attitude taken by Chief Alcock is wholly without foundation.

Your statement that I suggested to you that prize fights or boxing or sparring exhibitions could be held at Comiskey Park next Saturday provided the military authorities took possession thereof is not true. Such suggestion was discussed between you and me, but it emanated from you and not from me. You were referred to Assistant Corporation Counsel James W. Breen, who took up the matter with you and told you plainly that such exhibitions could not be permitted. You then promised Mr. Breen that you would procure authority from the secretary of war for the giving of this exhibition. But you have failed to do so.

According to the newspapers, you expect to have Jack Dempsey, Jesse Willard, and other well-known professional prize fighters on exhibition next Saturday afternoon. And, while, in your letter, you state, as above quoted, "that nothing on Saturday's program in any way violates the law" you go on to say: "There is to be * * * a scientific exhibition of boxing by the men of Camp Grant and Fort Sheridan." Perhaps when you made the statement in your letter, your attention had not been called to Section 235, above quoted, which reads as follows:

"Whoever instigates, carries on, promotes, or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months."

In considering this question, it is important to avoid a confusion of issues.

As above pointed out, the state law positively prohibits not only prize fights, but sparring or boxing exhibitions.

The Legislature has frequently considered this question and has conclusively established that such exhibitions in public are contrary to good morals and against the public interest. Their value as a part of the training of soldiers and sailors in military camps is not a question here involved. The question here presented is as to the legality of such exhibitions before the general public in a place of amusement.

The city officials are charged with the enforcement of the state laws, as they find them; and they have no right to enforce such laws as they deem wise and refuse to enforce such laws as they think unwise.

And no responsible Federal authority has attempted to suspend the state laws with respect to prize fighting and sparring or boxing exhibitions. On the contrary, as we have seen, the Navy Department has taken the position that such laws should be obeyed.

No one questions the propriety or commendableness of making contributions to the Over-seas Fund of the Salvation Army. Let there be no misunderstanding on that point. Such contributions are most praiseworthy and should be encouraged in every legitimate way. Everyone should contribute to the extent of his ability. But no one having only the interests of the soldiers and sailors at heart will make his contribution to such fund depend upon prize fights and boxing and sparring exhibitions being held in violation of the statutes of the State of Illinois.

In short, no one has the slightest desire in any way to obstruct contributions to the Over-seas Fund of the Salvation Army, but every good citizen should be opposed to the promotion of prize fights and sparring or boxing exhibitions in defiance of the state law.

In view of the foregoing, you will perceive that it is my opinion that Chief Alcock has taken the only position which, as chief of police, he could take, under the law.

Very truly yours,

SAMUEL A. ETTELSON,
Corporation Counsel.

Licensing and Regulation of Places of Amusement.

August 14, 1918.

HON. JOS. O. KOSTNER, Chairman Committee on Home Defense, City Council.

Dear Sir:

We are in receipt of your communication of recent date, requesting us for an opinion on the constitutionality and legality of an ordinance submitted to your committee on August 5th, licensing and regulating places of amusement, and also an opinion on an amendment to the amusement ordinance in The Chicago Code of 1911.

In reply to your communication we beg to advise you, that the ordinance in question defines public places of amusement to which the general public may be admitted without the payment of an admission fee, and provides for the licensing of same. The ordinance provides that the application shall be filed by the applicant, giving a description of the place where it is proposed to conduct a public place of amusement, and the seating capacity of such place. It provides that upon such application being made, it shall be referred to the general superintendent of police for investigation, and if he shall find the applicant to be a person of good moral character, he shall refer the same to the commissioner of buildings, who shall cause an investigation to be made of the premises for which a license is requested, and if the commissioner of buildings shall find that the premises in question are suitable for the purpose for which the license is desired, he shall recommend the issuance of a license, and refer the application to the commissioner of health, who shall make or cause to be made an investigation as to the sanitary condition of said premises, and, if he shall believe that the place for which an application for a license has been filed is a suitable and proper place to be so licensed, he shall so recommend, and the mayor upon the recommendation of the general superintendent of police, the commissioner of buildings and the commissioner of health shall if in his discretion he deems it advisable issue

or cause to be issued to such applicant a license to conduct a place of public amusement.

The ordinance also provides that all places of public amusements shall during the duration of the war close, not later than 1 a. m.

Clause 41 of paragraph 62 of the City and Villages Act, Hurd's Statutes of 1915 and 1916, page 306, confers upon the City Council power to "license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatrical and other exhibitions, shows and amusements, and to revoke such license at pleasure."

Clause 66 of the same paragraph, confers upon the City Council power to regulate the police of the city and village and to pass and enforce all necessary police ordinances.

Clause 78 of paragraph 62, confers upon the City Council power to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

In order to sustain an ordinance under the police powers of the council, it must appear that the ordinance has for its purpose the preservation of the public peace, morals or health of the community. There is express power given to the City Council to regulate amusements but even if it were to rely upon the general police power of the council, we are satisfied that the ordinance in question will be held constitutional and its provisions sustained by the courts.

In the case of *Nahser v. City of Chicago*, 271 Ill., the Supreme Court, on page 291, in discussing the power of the City Council to regulate places of amusement, said:

"Clause 41 gave cities all the power the state had to do the things purported to be authorized by said cause, subject to no limitations except those imposed by the constitution upon the Legislature."

Clause 41 does not limit the power of the council to license and regulate only places of amusements where an admission fee is charged, but confers upon the council power to license, tax and regulate theatricals and other exhibitions and shows wherever given, and we are of the opinion that the council has

express power conferred upon it to pass the ordinance in question.

In regard to the amendment you talk about in your communication, it simply provides that all places of public amusement to which an admission fee is charged shall be closed not later than 1 a. m. And, in our opinion the council possesses express power to pass the amendment to the amusement ordinance referred to in your letter.

In conclusion, we beg to advise you that in our opinion the ordinance licensing and regulating public places of amusement, and the amendment to the amusement ordinance requiring places of amusements to close at 1 a. m. are both constitutional, and the provisions of the same can be enforced by the municipal authorities, and that if the ordinances are ever tested before the courts, it is our opinion that they will both be sustained.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Censorship of Foreign Films.

August 14, 1918.

HON. JOHN H. ALCOCK, Acting General Superintendent of Police.

Dear Sir:

You have referred to us a letter from New York on stationery purporting to be the stationery of "Division of Films, Committee on Public Information," signed by Chas. C. Hart, director, dated August 7, 1918, and addressed to Board of Censors, Motion Pictures, Chicago, Ill., which reads as follows:

"It has been brought to our attention that the Official War Review brought out weekly by this Division, through the branches of the Pathé Exchange, Inc., is subject to censorship in your city.

“Inasmuch as the films are censored in France and also in Washington by the Federal Board of Censorship and members of the War College, there does not seem to be any reason why they should be recensored by other boards.

“We would appreciate an expression from you in regard to this matter before going into it further.”

By the terms of the city ordinances no motion picture can be exhibited in the city without having first been censored, as by such ordinances prescribed.

It is your duty as a city official to obey and to require others to obey such city ordinances—certainly unless and until you are relieved of that duty by some official or officials having authority to relieve you of that duty.

Of course, we recognize that in matters pertaining to the conduct of the war the authority of the United States government is superior to that of the city government; and it is our opinion that the United States government has the power, if it desires to exercise the same, to require the city officials to permit the exhibition, without their having been censored under the city ordinances, of motion pictures shown by authority of the government as an aid in the prosecution of the war.

We are not advised as to whether or not Mr. Hart is authorized to speak for the United States government on this subject.

The second deputy superintendent of police, who is by the ordinances charged with the duty of censoring motion pictures, informs us that the pictures known as the “Official War Review” have been submitted for censorship by a private motion picture concern, and that the United States government has neither presented for censorship nor asked for a permit to show without censorship, nor attempted to exhibit on its own responsibility, any of such pictures.

In these circumstances it seems to us that you have no choice but to require such pictures to be censored under the ordinances.

We suggest that you send a copy of this opinion, together with a copy of the ordinances, to Mr. Hart.

Yours very truly,
CHESTER E. CLEVELAND,
First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

**Return of City Collector on Special Assessments to
County Collector.**

August 20, 1918.

HON. HENRY STUCKART, County Collector.

Dear Sir:

Our attention has been called to the fact that the county collector refused to accept the return of the city collector on delinquent special assessments, which was tendered to him about August 8, 1918, the reason given for such refusal being that under the statute the return is to be made on the 1st of August or before.

This is a matter of grave importance, because the amount involved is very large, and there are, furthermore, questions as to the legality of collecting after the date at which said return is to be made. We therefore write to you, in order to see whether we cannot arrive at an understanding without further delay.

We do not quite understand your position in this matter. The statute (Section 67) says that the application for judgment upon delinquent special assessments or special taxes can not be made before the September term of court. The statute does not, however, prohibit making such application at the October term of court if the return is made so late that you can not get into the September term. It would seem to us that an application made for judgment at the October term would satisfy every requirement of the statute so far as your office is concerned.

With regard to the failure to return by August 1st, while the statute does make that requirement, we are of the opinion that the failure to make same on or before the day is not fatal.

We call your attention to the case of *Steidl v. People*, 173 Ill. 29, in which it was held that the fact that the city collector's return of delinquent assessments is not filed with the county collector until after the first day of April does not constitute a valid objection on an application for judgment of sale where the return shows that the delinquency occurred prior to that date. The same doctrine was adhered to in the case of *Harris v. People*, 218 Ill. 439.

We regret exceedingly that the conditions were such that the city collector found it impossible to make the return within the time specified, but we trust that upon further consideration you will not refuse the return when it is again tendered to you. We would esteem it a favor if you would at once look into this matter and obtain the advice of the state's attorney to whom we have also written in regard to the situation.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

In Re Complaints Concerning West Randolph Street Market.

September 4, 1918.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

Pursuant to your direction, the writer investigated the complaints made, through August Geweke, president of the Truck Gardeners Association, and Ex-Alderman Michaelson, concerning alleged abuses at the West Randolph street market. It appears from information gathered from these parties, and also from statements made by the market master, Mr.

August Scholz, that there are hucksters and traders who attempt to secure places for the sale of goods bought by them at said market. The ordinance controlling this matter is as follows:

“1595. PRODUCER ONLY TO SELL.) Peddlers’ and purchasers’ wagons shall be removed from the market as soon as those in charge of them have completed their purchases.

“Peddlers and purchasers shall not be allowed to remain and sell any goods or produce whatever on said market, at the place aforesaid, and no persons but producers shall be allowed to sell produce on said market.”

It was undoubtedly the intention of this ordinance to prevent the use of the space by any except those who are actually engaged in truck farming. It is difficult to establish in every instance the right of a person who claims to be entitled to the privileges accorded therein, but it seems that the market master from long experience and from personal contact with the truck farmers is able to weed out all except a few. This is done from time to time, but through one means or another, the abuse always recurs until it is checked. Some four or five weeks ago it had grown to extraordinary proportions. It is said that a number of persons who claimed such rights allowed empty wagons to stand in the market place from 7 o’clock in the evening until such time as they were able to get some produce on another wagon, and then would withdraw the empty wagon and replace it by one that was filled. Complaints having been made to the market master, he succeeded in driving off all the offenders. After that a number of these persons appeared with leases purporting to show that they were engaged in the business of truck farming.

The market master submitted these leases to the comptroller, and he in turn submitted them to the corporation counsel for examination and investigation. Pending this investigation the market master was advised that he should permit persons who made claim to the privileges of the market by reason of having such leases to continue to use the space along with those who were known to be truck farmers. No

final report has been made to him concerning these leases. That is the situation at the present time.

Mr. Scholz states that when he is advised concerning these leases he will be able to act, and has no doubt of his ability to keep the market free from intruders that have no right to use same for purposes of disposing of merchandise. He asks that he should be given explicit instructions. Such instructions must necessarily come from the mayor or some one authorized by him to speak for him.

We recommend that upon the completion of the investigation concerning the leases above mentioned, the market master should be told how to exercise his judgment.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Repair of Viaduct at B. & O. R. R. Terminal.

September 5, 1918.

HON. FRANK I. BENNETT, Commissioner of Public Works.

Dear Sir:

We have before us your letter relating to the viaduct extending west from 12th street immediately south of the river to the B. & O. C. T. R. R. Co. You state that this viaduct is in bad condition and requires repairs, that the railroad company has been notified by the inspection section of the bridge division to repair the same, and that it claims that this is a private viaduct over which the city has no jurisdiction with respect to inspection or compelling repairs.

You ask to be advised whether the city has the power to inspect and order repairs in such a case, and if not, whether the railroad company should be compelled to place a large sign reading "Private Driveway" at the entrance to same.

Your letter does not indicate to what extent the viaduct is used by the general public, nor is sufficient information given to enable us to determine whether there is an implied invitation to the public to use it. The liability of the city for injuries resulting from defects thereon depends largely on these conditions.

There is no doubt whatever as to the power of the city to inspect a structure of this kind, whether it is on private or public land, nor is there any doubt as to its authority to order repairs if the conditions are such that they amount to a nuisance.

Under the rule laid down in *City of Chicago v. Baker*, 195 Ill. 54, and in *Village of Mansfield v. Moore*, 124 Ill. 133, a municipality may be liable for injuries due to a defective walk or driveway even if it is on private property, if connected with the highway in such a way that the public uses it.

The use of a sign reading "Private Driveway" would tend to advise the public that the city is not primarily responsible for the condition of same. If the structure in question is not in such a dilapidated condition that it amounts to a nuisance, such a sign will probably be sufficient to relieve the city of liability in case of accident, but if the conditions are dangerous and the railroad company refuses to make the necessary repairs, the viaduct should be barricaded in such a way that the public does not use it; otherwise there would be grave doubt as to whether or not the city is liable.

Your disposition of this matter therefore depends on the actual conditions which prevail, and you may order the sign or the place barricaded as you in your judgment deem proper according to the view expressed above.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Use of City Funds for Pay-Rolls.

Chicago, Sept. 10, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir :

Since the conference in your office at which the city treasurer and chairman of the Committee on Finance were present, concerning the necessity for raising funds for payrolls for the month of September, the writer has had numerous discussions with the city comptroller and members of his staff, as well as with representatives of the city treasurer's office, including the latter's attorney.

The situation, as you are well aware, may be summed up by saying that there is no money available for payrolls in the corporate fund, and the city treasurer does not feel that he would be safe in advancing money from other funds under the ordinance of August 5, 1918 (Council Journal, pp. 773-4), which contemplates a loan from the funds of the city to be repaid at such time as the syndicate of bankers mentioned therein will have purchased the payroll vouchers of employes in accordance with the promise and agreement of this syndicate.

The attitude of the city treasurer is rather unlooked for, because at the time the written promise of the bankers was secured the negotiations were held up until word was obtained to the effect that such a document as was submitted would be regarded as sufficient basis for such a loan by the comptroller and treasurer if backed by the sanction of the City Council. There would, of course, have been no occasion whatever for securing this document or for securing action on the part of the City Council if either of these officers were unwilling to so regard the written promise thus obtained. Nevertheless, the assent given at the time was tentative, and moreover in a matter of such great moment the transaction could not be regarded as settled until the transfer was actually made. Hence, while the reluctance of the city treasurer to turn over the funds under the ordinance in question is unexpected, there

was always a likelihood of it, because the transaction is not one for which there is provision made in the statutes.

We face a situation where it is necessary to overcome the objection of the treasurer. It is doubtful whether he could be compelled by mandamus to advance the money, and in any event the time that would necessarily have to be consumed if the case were contested, even if there was no appeal, would defeat such an effort.

The treasurer on his part says that he can be fully secured for such advance as may be required for the September payrolls if, in place of acting under the ordinance above mentioned, tax anticipation warrants were issued by the comptroller. In view of the fact that under the most favorable circumstances, in order to meet the payrolls for the balance of the year it will be necessary to obtain at least \$1,000,000 in addition to the \$1,750,000 that is expected by way of an advance from the bankers' syndicate, this is perhaps the best way to overcome the difficulty.

Estimates heretofore made, which assumed that only about 400 or 500 saloons will go out of business on November 1st, will have to be revised, owing to the Federal government's new order closing the breweries. The shortage of \$2,750,000 indicated above does not take into consideration the loss of revenue that may result from this order. A situation which is bad now may become calamitous before the end of the fiscal year. We will not attempt at this time to say what shall be done when that time arrives. What we do seek to point out is the fact that even under the old estimates it was quite plain that an additional \$1,000,000 would have to be raised by tax anticipation warrants sooner or later. Hence, it might as well be done now as later if by issuing this paper the objection of the treasurer is overcome.

We are advised that the total amount of these warrants now outstanding against the 1918 taxes is \$9,900,000. The tax levy for general corporate purposes is approximately \$17,000,000. Under the statute these warrants may be issued "to the extent of seventy-five per centum of the total amount of any such tax levied." The strict letter of the law, therefore,

would permit the issuance of \$12,750,000, although it is doubtful whether the revenue from the entire levy will greatly exceed \$11,000,000.

While the fiscal officers of the city are the best judges as to the amount which they can safely issue, we do not believe there would be any impropriety in issuing an additional \$1,000,000 worth of these warrants at this time. It appears that an issue of that amount would not suffice for the September payrolls, but that, if the money which the syndicate of bankers has promised is forthcoming on October 1st, the balance of the September payroll can be taken care of out of that.

We, therefore, recommend that the effort be made to finance the September payrolls in this manner. The Law Department will co-operate by immediately taking up the question of securing the promised money from the bankers on the first of October.

What the condition will be after the first of November is problematical. The City Council faced the possibility of an enormous shrinkage in revenues due to the wiping out of saloon license fees at the time the budget was prepared. But while this possibility was considered it could not be guarded against because there was no other source of revenue from which to draw in order to make up the deficiency if it should occur. If there should be such a falling off of license fees as now appears likely the situation will undoubtedly become acute and will call for such drastic action as may be proper in case of emergency but can not be recommended at a time when there is even a remote possibility of avoiding such a contingency.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

Furniture Required for New Police Station.

September 30, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

In your letter of recent date you called attention to a request of the general superintendent of police contained in a requisition covering the purchase of certain furniture, amounting to approximately \$408.00, for the new station at Superior street and Racine avenue.

Your inquiry was directed to the question whether the appropriation, under code designation 430-X-26 which sets apart \$37,508.35 for "new station and site, Superior and Racine avenue" could be properly applied to the purchase of the furniture in question.

We have made inquiry in regard to this matter and find that in his specifications for the building, the city architect included certain furniture of a design appropriate to the building and that he made provision in said specification for buying this separately in case it was not deemed advisable to let the contractor install it. The city architect states that all he is doing now is to separate this item from the balance, as provided for in said specifications because it will be of advantage to the city to place this order separately.

It is customary in preparing plans and specifications for a public building to include therein such necessary furniture as desks, benches and chairs in order that the same may harmonize with the finish on the building in the various rooms where it is placed. No question of this kind would have arisen if the contractor had included the same in the materials and work that he furnished.

We do not believe, therefore, that it would be proper to draw the line too strictly in a case of this kind when it is deemed advisable to get a part of the equipment elsewhere. A great deal may be said both for and against the use of the money so appropriated for this purpose. That is to say, if nice distinctions were made, it is possible that furniture of this kind would not be included under a claim for mechanic's lien

in a private building but even under our lien law, we are of the opinion that the furnishing of this material for a public improvement of this kind would be regarded as coming within the purview of the law.

In our opinion, therefore, the installation of the furniture in question comes fairly within the requirements of the building and that it would be proper to honor the requisition.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Refusal of County Collector to Accept Return of City Collector on Delinquent Special Assessments.

October 2, 1918.

HON. EUGENE R. PIKE, City Collector.

Dear Sir:

In response to your request for advice as to the steps to be taken for the purpose of collecting delinquent special assessments, we submit the following:

Under the statute passed at the last session of the General Assembly (Session Laws of 1917, p. 244), the city collector is required to cause to be marked on the general tax books of the county collector, on or before March 10th, opposite the description of each lot, block, etc., affected, the number of the special assessment or special tax warrant which stands against it. It then becomes the duty of the county collector to stamp on all tax bills the number so marked and words "Special assessment due and payable."

The said law also provides that the books shall remain in the hands of the city collector until August 1st, at which time he shall make the return of delinquent special assessments to the county collector which heretofore he made on April 1st, and that thereafter the county collector shall proceed to obtain judgment as heretofore, but no application can be made before the September term of court.

The law was intended to save the city the collection fees that would otherwise accrue, to put the money thus collected at once into the city treasury, and to relieve the taxpayer of the costs of advertising, judgment and sale if payment was made before the first of August. Apparently the law has worked out well, because the city this year collected in the first eight months through the city collector the sum of \$9,852,-801.85 as against \$3,171,262.67 for the entire year 1917. Thus, there was a saving of about \$67,000 in collection fees, with four months not yet reported, besides accretions in the shape of interest which will undoubtedly amount to a great deal. It is not unlikely that the net gain for the city for the year will be considerably over \$100,000, and if there had been no difficulty about advertising and obtaining judgments on delinquent property the law would have been a complete success.

It appears, however, that the city collector was unable to make the return of delinquent special assessments to the county collector on August 1st, as the law provided. We are informed that this was due to the fact that the city collector was not given sufficient help to accomplish it.

From the facts laid before us we learn that the city collector closed his books to the public on July 10th and attempted to complete the return by August 1st. When he found he could not do this he made an arrangement with the county collector by which the time was extended to August 5th. On that day he sent the first books over, but the county collector refused to accept them. The latter says only two books were tendered to him, and insists that there would not have been a complete return on which to proceed to advertise before September 1st. Whether he is correct or not is unimportant at this time because there has not been a tender made that will furnish the basis for a demand on him to advertise as required by law.

The matter was not called to our attention until about two weeks after the county collector's refusal to accept the books. We at once wrote to the county collector and to the state's attorney, showing them that the delay did not have the effect of invalidating such return, that the provision as to the

date of making return was directory at best, and that the application for judgment could be made at a subsequent term of court. In this connection we called attention to *Steidl v. People*, 173 Ill. 29, and *Harris v. People*, 218 Ill. 439, which sustain our contention.

Our efforts along this line were fruitless. The county collector declares that he was nearing the end of his term, that he could not handle the matter before the expiration of same, and that in any event we had not made the return, and therefore he would resist any attempt to compel him by mandamus to proceed to advertise and apply for judgment. We again took up the matter with the city collector with a view to making a tender of the books. We found that it would be necessary to again close his books to the public for about three weeks in order to prepare a return for the purpose of making the proposed tender.

Herein lies the chief difficulty. It now becomes necessary to determine whether this shall be done or whether it is more to the advantage of the city to allow the application for judgment to go over until next year.

So far as actual loss on account of failure to force collection this year is concerned, that will not be great, because all deferred installments will continue to draw interest. The so-called "flat" assessments do not draw interest, and in so far as payment is deferred on these, there will be a loss in interest. The feature which causes the most concern is the fact that unless a way can be found to force collection, the city will have to default on some of its special assessment bonds, which we are told it has not done for years.

It has been suggested that suits might be started against the persons owning the property assessed. But that is not possible except in the case of property which has been forfeited after tax sale. Under Section 71 of the Local Improvement Act all laws in relation to the enforcement and collection of the general taxes are made applicable to special assessments. Therefore, the city can avail itself of the remedy prescribed in Section 230 of the Revenue Act. This permits a remedy *in personam* as to real estate taxes only after the remedy *in rem* is exhausted. (See *Smith v. People*, 3 Ill. App.

380; *O. & M. R. Co. v. Highway Comms.*, 117 Ill. 279.) In other words, before the owners of the property can be sued the property must be advertised as delinquent, judgment and order of sale must be obtained, and there must be a tax sale and forfeiture in accordance with the statute.

In our opinion a writ of mandamus can be secured which will compel the county collector to take action, but before such an action can be successfully instituted there will have to be a tender of the report of the city collector. In this connection we beg to caution you that whatever is done along this line will have to be done without delay, since it may be that the court will hold that the application for judgment can not be made later than the December term of court, owing to the following provision in Section 67 of the Local Improvement Act:

“The application for judgment upon delinquent special assessments or special taxes in each year shall include only such special assessments, special taxes, or installments thereof, and interest, as shall have been returned as delinquent to the county collector on or before the first day of August in the year in which said application is made, and marked on the general tax books of the county collector on or before the tenth day of March, as provided in Section 64a hereof.”

The year mentioned in the statute may be construed as the calendar year. Hence, the necessity for prompt action if anything is to be done.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

CHESTER E. CLEVELAND,

Acting Corporation Counsel.

Right to Hold a Civil Service Position Open More Than 30 Days.

October 7, 1918.

HON. THOMAS O'CONNOR, Fire Marshal.

Dear Sir:

In the case of *Daniel W. Roderick v. City of Chicago et al.*

(General Number B 17035, a mandamus suit in the Circuit Court, seeking to compel respondents to appoint Roderick as superintendent of machinery in the Fire Department, the cause was heard upon the amended petition of the petitioner, the answer of the respondents thereto and the demurrer of petitioner to said answer.

One Weinhardt had been appointed superintendent of machinery in the Fire Department on February 17, 1914, and occupied such position and performed the duties thereof until November 16, 1915. On November 4, 1915, he filed an application for a leave of absence without pay from November 16, 1915, for one year. Roderick at that time stood at the head of the eligible list for appointment as superintendent of machinery. The fire marshal declined to give notice to the Civil Service Commission of a vacancy in such position. Roderick waited until December 22, 1915, and then filed his petition for a writ of mandamus to compel his appointment.

The trial court held that Roderick was not, as a matter of law, entitled to the relief sought by his petition, and judgment was rendered in favor of the respondents. The Appellate Court in affirming the judgment of the Circuit Court (Appellate Court, General Number 22478) held, that while under the rules of the Civil Service Commission the fire marshal *might* have filled the position in question by appointing Roderick thereto during the leave of absence of Weinhardt, yet he was not compelled to do so under the provisions of the civil service law, if in his judgment such appointment was unnecessary for the proper functioning of the Fire Department.

The Supreme Court (283 Ill. 462) disagreed with the Appellate Court and with the Circuit Court and reversed both judgments, holding that the Civil Service rules "do not permit the holding of positions open for officers or employes for a longer period than thirty days, or, in case of injury in the service, sickness or other disability, ninety days, and the statute requires vacancies to be filled. The place was vacant and the duty of filling it was not discretionary."

The cause was reinstated in the Circuit Court on July 8, 1918, and on October 7, 1918, judgment was rendered in ac-

cordance with the opinion and mandate of the Supreme Court to the effect that Roderick is entitled to the civil service status that he occupied on December 16, 1915, at the head of the eligible list, and is to be certified and appointed as superintendant of machinery pursuant to a requisition to be made by the fire marshal as provided in said judgment order, a copy of which is enclosed herewith.

Yours very truly,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Pension Status of Secretary of Police Department.

October 15, 1918.

TO THE BOARD OF TRUSTEES OF THE MUNICIPAL

PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt of your request for an opinion as to whether or not, in computing the period of service, Si Mayer, Secretary of the Police Department of the City of Chicago, and a participant in the Municipal Pension Fund, should receive credit for the period of two years from April, 1911, to April, 1913, during which time Mayer was on a leave of absence from his position in the classified service of the city and served as a member of the City Council.

In reply, we beg to advise you that Section 1 of the Municipal Pension Fund Act now in force and effect contains the following provision:

“In computing the duration of service of each employe, the time during which he or she may have been absent from duty during his or her entire term of service, for any cause other than suspension or discharge, shall be included.”

It is not contended that Mayer was absent from duty by reason of his suspension or discharge, and the records of the Civil Service Commission clearly show that he was on a leave

of absence and that he complied with all the rules and requirements of the Civil Service Commission to entitle him to such leave of absence in accordance with law.

In computing his service as an employe in the classified service of the city for the purpose of ascertaining and determining his status under the Municipal Pension Fund Act he is entitled to and should receive credit for the two years in question.

Yours very truly,
JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Board of Education.

November 2, 1918.

HON. MATT A. FRANZ, Chairman, Committee on Schools, Fire,
Police and Civil Service.

Dear Sir:

On the 23d day of April, A. D. 1917, the mayor appointed Jacob M. Loeb and Mrs. Frances E. Thornton as members of the Board of Education of the City of Chicago, a body politic and corporate, under the Act of the Legislature approved by the governor on April 20, 1917. The City Council voted to approve these appointments on the 30th day of April, 1917.

Subsequently the mayor appointed nine other persons as members of said board, but the Supreme Court has decided that these appointments were not approved by the City Council. We transmit herewith a copy of the opinion of the Supreme Court in so holding.

On October 28, 1918, the mayor appointed eleven persons as members of said board, and the City Council has under consideration the question of approving such appointments.

Mrs. Frances E. Thornton is one of the eleven appointments made by the mayor on October 28, 1918, but Jacob M. Loeb was not then appointed by the mayor. On the contrary,

John Fitzpatrick was appointed by the mayor as a member instead of Jacob M. Loeb.

We have been asked for an opinion as to whether Jacob M. Loeb and Mrs. Frances E. Thornton are now members of the said Board of Education by virtue of their former appointment by the mayor and the approval thereof by the City Council.

Section 128 of the Act of the Legislature referred to, among other provisions, contains the following:

“The said Board of Education shall consist of eleven members, to be appointed by the mayor, with the approval of the City Council, three of whom shall be appointed for the term of one year, two of whom for the term of two years, two of whom for the term of three years, two of whom for the term of four years, and two of whom for the term of five years. Thereafter, at the expiration of the term of any member of said board, his successor shall be appointed in like manner, and all persons thus appointed, and their successors, shall hold office for the term of five years from the first day of May of the year in which they are appointed. * * * If any person so appointed shall fail to qualify within a period of thirty days after his appointment, the office shall be filled by a new appointment for the unexpired term. * * * They (members of the board) shall not, while serving as such members, hold other public office under the Federal, State or any local government other than that of notary public or member of the national guard, and by accepting any such office while members of the Board of Education, or by not resigning any such office held at the time of being appointed to the Board of Education within thirty days after such appointment, shall be deemed to have vacated their membership in such board.”

In said Section 128 there is a proviso that

“in such cities wherein at the time this law shall go into effect there are members of a board of education holding office by appointment, such members shall continue in their office until eleven persons have been appointed and qualified as members of said board of education under this act.”

These provisions of the statute clearly indicate that the Legislature intended that the members of a board of education holding office by appointment at the time when the Act of

April 20, 1917, should go into effect should continue in their office only temporarily until the new board, a body politic and corporate, provided for by said act would be organized; and that such new board should be speedily organized and take charge of the schools. As applied to the City of Chicago the Legislature obviously intended that the new board—a body politic and corporate—consisting of eleven members, should speedily be organized and that the old board consisting of twenty-one members should continue in charge of the schools only long enough to permit the appointment and qualification of the new board of eleven members. Any plan or scheme to perpetuate the old board in power or to postpone indefinitely the organization of the new board, would be in defiance of the will of the Legislature as plainly expressed in the Act of April 20, 1917.

Thus, for illustration, if the mayor, with a view to perpetuating the old board in power, had neglected to appoint the eleven members of the new board, he would have been clearly guilty of a breach of public duty and a violation of his oath of office to enforce the law, and he could have been compelled by mandamus to make such appointments. And he could not have escaped this duty by appointing a part of the members of the new board and neglecting to appoint the others.

The Legislature further manifested its intention that the new board should be speedily organized by imposing upon each member the obligation to do all in his power to effect such organization within thirty days after his appointment. To that end it is provided that "if any person so appointed shall fail to qualify within a period of thirty days after his appointment, the office shall be filled by a new appointment for the unexpired term," and that any member, by not resigning within thirty days after his appointment any other office he may hold at the time of his appointment, except notary public or member of the National Guard, shall be deemed to have vacated his membership in such board.

Thus, by the terms of the statute the appointment of any person as a member of the new board became void unless

such person not only qualified as such member but also removed the objection to his qualification above mentioned within thirty days after his appointment.

The Legislature further manifested its intention that the management of the schools should promptly be taken out of the charge of the old Board of Education and placed in charge of the new Board of Education by adding an emergency clause to the Act of April 20, 1917, by which the act became immediately effective on its signature by the governor instead of on the following July 1st, as is ordinarily the case.

Again, the prime business contemplated by the Legislature at the outset was the organization of a municipal corporation—a body politic and corporate—to have charge of the schools; and not the mere appointment of individuals to offices. This corporation could not be organized until the eleven members were appointed. To begin with three members were to be appointed for one year, two members for two years, two members for three years, two members for four years and two members for five years; and then the board was to consist of members whose terms of office would be for five years, two of whom would be appointed on or about May 1st of each year, except that a group of three would be embraced in the first one-year term.

Manifestly, therefore, the prime business in hand being the organization of the new body politic and corporate, the Legislature contemplated that the eleven members should be appointed at about the same time; and the Legislative intention would be defeated by holding that some such members could be appointed to continue to be members until some indefinite time within five years when the corporation might be organized. And the Legislature expressly guarded against such contingency by providing that if any appointee did not within thirty days after his appointment both qualify and also resign any other office he might hold, except notary public or member of the National Guard, he would cease to be a member.

It should be remembered that the public schools are state and not city institutions. The constitution provides:

“The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.”

Therefore, we are obliged to give even more weight than in ordinary cases to the intention of the Legislature with respect to the management of the schools; and to construe the statute so as not to frustrate its paramount intention that the charge of the schools should promptly be taken away from the old board and vested in the new board for the creation of which the Act of April 20, 1917, provided.

It will be observed that the Act of April 20, 1917, does not in terms define what shall constitute “qualifying” by a member. But obviously qualifying as a member of a corporation to be organized consists in perfecting the organization of the corporation and entering upon the discharge of the duties of a member of such corporation and resigning from any other office he may hold, when that is required by the statute.

Applying the foregoing to the case before us, under the decision of the Supreme Court the new body politic and corporate has never been organized, although more than a year has elapsed since the attempted organization thereof. It has been held by such court that nine of the eleven members necessary to complete such organization have never been legally appointed. Mr. Loeb and Mrs. Thornton, at the time the Act of April 20, 1917, went into effect, were members of the old Board of Education, holding their offices by appointment. They were appointed as members of the new board on April 23, 1917; and hence more than a year and a half has elapsed since they were appointed. Neither of them, within thirty days after their appointment, resigned as a member of the old board or qualified as a member of the new board by perfecting the organization of the new board or by entering upon the discharge of the duties of a member of the new board.

Therefore, we are of the opinion that the offices of members of the Board of Education of the City of Chicago, a body politic and corporate under the Act of April 20, 1917, to which

Jacob M. Loeb and Mrs. Frances E. Thornton were on April 23, 1917, appointed are now vacant.

Respectfully submitted,
SAMUEL A. ETTELSON,
Corporation Counsel.

Personal Liability of Comptroller for Payment of Salaries.

November 6, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Referring again to your request for an opinion as to the personal liability of yourself and the sureties on your bond in case you countersign the tax anticipation warrants and warrants for the payment of teachers' salaries submitted to you by Jacob M. Loeb, we beg to say:

We have before us the letter of Jacob M. Loeb dated November 5, 1918, in reply to your letter of November 4, 1918, in which he still refuses to indicate in what capacity he and Mr. Larson signed and submitted these warrants. Therefore, we are obliged to determine that question as best we can from the facts before us.

Our understanding is that approximately \$2,050,000 have heretofore been realized on tax anticipation warrants drawn against the educational tax for 1918 under an ordinance of the City Council passed May 13, 1918. These were authorized on the request of the so-called Davis Board of Education under the Act of April 20, 1917. It is now proposed to raise approximately \$1,600,000 additional upon tax anticipation warrants which were so authorized by the City Council on the request of said Davis Board of Education. Of course, if said Davis Board was neither *de facto* nor *de jure* the Board of Education when it made such request, the tax anticipation warrants referred to are not authorized by law. However, our opinion is that such board was at least the *de facto* Board of Education of the City of Chicago under the Act of April 20, 1917, until it was finally ousted by the judgment of Judge Scanlan on October 26, 1918, and the action of the present

Board of Education in submitting the warrants referred to and requesting you as comptroller and the mayor to countersign them is a distinct recognition that such Davis Board was at least the *de facto* Board of Education under the Act of April 20, 1917, when it requested the City Council to authorize said tax anticipation warrants.

So far as we know, neither the Supreme Court nor any other court has held that the Davis Board was not the *de facto* Board of Education during the time that it was actually in charge of the schools.

In making this statement we assume that the Board of Education now in charge of the schools is not the Board of Education, a body politic and corporate under the Act of April 20, 1917, but is the old Board of Education continuing in office under the proviso to Section 128 of said Act, and in that capacity has charge of the schools until the new body politic and corporate provided for by the Act of April 20, 1917, is duly organized.

With the understanding aforesaid, it is our opinion that you and the mayor would not incur personal liability in countersigning the warrants, but as a precautionary measure we think you should notify the city treasurer that you have countersigned them with such understanding.

The pay roll warrants seem to us to be signed substantially in due form, but we believe that the tax anticipation warrants instead of being signed as they are should be signed substantially "Board of Education of the City of Chicago, by Jacob M. Loeb, its President, Attest, Lewis E. Larson, its Secretary."

Yours very truly,
SAMUEL A. ETTIELSON,
Corporation Counsel.

Status of Alderman Elected Judge of Municipal Court.

November 12, 1918.

HON. IRWIN R. HAZEN, 909 Title and Trust Building.

Dear Sir:

We beg leave to acknowledge the receipt of your com-

munication of the 7th instant in which you ask us for an opinion as to whether you could, should you wish to do so, retain your office as alderman, serving without salary until the expiration of your term, and at the same time qualify as a judge of the Municipal Court of Chicago.

In reply, we respectfully advise you that under the law it is impossible for you to hold any other office under the city government and at the same time occupy the office of alderman.

Section 33 of Chapter 24, page 300, Hurd's Revised Statutes, which section defines the qualifications of aldermen, provides as follows:

“QUALIFICATIONS OF ALDERMEN.) § 5. No person shall be eligible to the office of alderman unless he shall be a qualified elector, and reside within the ward for which he is elected, nor shall he be eligible if he is in arrears in the payment of any tax or other liability due to the city; nor shall he be directly or indirectly interested in any contract whatever to which the city is a party; nor shall he be eligible if he shall have been convicted of malfeasance, bribery or other corrupt practices or crimes; nor shall he be eligible to any office, the salary of which is payable out of the city treasury, if at the time of his appointment he shall be a member of the City Council nor shall any member of the City Council at the time hold any other office under the city government; nor shall he be either directly or indirectly, individually, or as a member of a firm, engaged in any business transaction (other than official) with such city, through its mayor or any of its authorized boards, agents or attorneys, whereby any money is to be paid, directly or indirectly, out of the city treasury to such member or firms.”

You will observe from the provisions of the foregoing section that you can not qualify as judge of the Municipal Court of Chicago and at the same time hold the office of alderman. The office of associate judge of the Municipal Court of Chicago, to which you have been elected, is an office under the city government, and the salary of said office is paid out of the city treasury.

In our opinion, before you can qualify as judge of the Municipal Court of Chicago it will be necessary for you to

tender your resignation as an alderman and to have your office as alderman declared vacant.

In compliance with your request, we have prepared and forward herewith your formal resignation as alderman of the 33rd ward.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Compensation of Special Counsel.

November 14, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of October 21, 1918, concerning the voucher in favor of Walter L. Fisher for \$6,152.30 for professional services, and calling our attention to the fact that on July 2, 30 and 31, August 2, 3, 4, 8 and 9, a charge was made on each of those dates for one and one-half days' services.

We find, upon investigation, that the contract between the city and Mr. Fisher embodied in Mr. Fisher's letter of June 2, 1916, provides that compensation be paid him as follows:

“For the time devoted by me (Mr. Fisher) to the work, at the rate of \$100 per day for the time spent in my office and \$150 per day for the time spent by me outside of my office;”

that on many of the days that Mr. Fisher has charged the city for services he had made charges for fractions of a day, only.

The language just quoted from the contract is susceptible of but two constructions. The first is that Mr. Fisher should be paid so much per day irrespective of the time spent in his work. The second necessarily takes into consideration parts of a day and requires an examination of the meaning

of the word "day" as used in the contract. There being nothing in the contract itself to indicate what is meant by a "day," resort must be had to the custom obtaining in the legal profession to determine the sense in which it was used in the contract.

We are satisfied that among lawyers employed on a per diem basis it is usual and customary to make an additional charge for evening work because the time spent in performing such service is considered as not included in the usual day of a lawyer.

Aside from any other consideration it would seem to be to the advantage of the city that the contract be interpreted on the basis that a day's service be paid for only when an entire day is devoted to the work and that when a fraction of a day is spent only part of a day's compensation is paid. It would necessarily follow that when time in excess of the usual day of a lawyer is spent on the work that there should be additional compensation.

We are therefore of the opinion, that so long as Mr. Fisher charges for fractions of a day only, when he does not spend the whole day in the city's service he also has a right to make an additional charge for services rendered in the evening.

Respectfully yours,

FRANK S. RIGHEIMER,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contract With Sanitary District.

November 15, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You forwarded to this department draft of a proposed contract with The Sanitary District of Chicago for operation, maintenance, etc., of certain electrical equipment and for

furnishing of electrical energy, which was referred to the writer.

Your letter accompanying same made particular mention of Paragraphs 38, 39, 40, 41 and 42 of said contract, and you asked to be advised whether the provisions contained in these paragraphs are fair and equitable to the city. This limits your inquiry to only one feature of the proposed contract and to matters that are not strictly speaking questions of law, but which relate more particularly to the fairness of the agreement. Nevertheless, since you ask to have a representative of the Law Department present to advise the sub-committee when the contract is taken up for consideration, we have gone a little beyond the precise question asked, in order that your committee may have a full understanding of the scope of the contract, although we do not pass on such matters as rates, service, equipment, etc., on which we are not qualified to advise you.

In the preamble and in Paragraph 1 of the contract (pp. 1-2) there are recitals to the effect that the district has duly completed the work to be performed by it under the terms of the agreement of October 27, 1910, and four supplementary agreements in a satisfactory manner. Such recitals in a new contract may have the effect of binding the city on the question of full performance of the former contracts.

Hence, if there is anything in the former contracts to be adjusted this should be done before this new contract is signed.

The proposed contract next specifically delivers and transfers certain substations and equipment from the Sanitary District to the city. As to all these matters, we assume that they have been checked up and the provisions amply cover what is intended. There is no inventory except as to the equipment at the 39th street pumping station, where the city receives only a part of the equipment. As to this part of the contract, therefore, the contract contemplates the transfer of the entire equipment in all specifically named substations and that part of the equipment at 39th street which is contained in the inventory.

Paragraph 5 contains a recital to the effect that certain substations were turned over to the Sanitary District under the former contract and that the same were delivered and transferred back to the city. This recital, like the others above mentioned, have the effect of disposing of any disputes which may have arisen in regard to this matter, and therefore, if there is any misunderstanding it should be settled now. The same rule applies to the recital in Paragraph 6, which declares that the Sanitary District turned over all property not needed for re-construction or operation to the city.

Paragraphs 7 to 10 inclusive relate to equipment and operation, and we do not comment on same because we are not qualified to advise your committee concerning these matters. The same could be said of Paragraph 11 but for the fact that the provision in regard to damage by electrolysis should be explained.

It is provided by the contract (Paragraph 11) that the city should give the Sanitary District the right to use, free of cost, all 12,000-volt transmission lines and cables belonging to the city which are to be used for supplying electrical energy to the substations of the city. The district agrees to operate, maintain and repair these at its sole cost and expense, except as to repairs made necessary by the action of electrolysis, which the city is to bear the cost of.

The determination as to the cause of the repairs is left with the electrical engineer of the district and the commissioner of gas and electricity of the city, and if they are unable to agree the matter is to be referred to the Board of Arbitrators provided for under Paragraph 45 of the contract.

We apprehended that as to this feature of the contract it might become a fruitful source of misunderstanding and a great expense to the city, and we took it up with the attorney for the Sanitary District. The latter said that the provision was inserted because the city by virtue of its police powers could control the matter of electrolysis, while the district was powerless to adopt means of overcoming the ravages of the diversion of currents of electricity—that the

damage in most instances was caused by stray currents from surface and elevated cars which the city was in a position to deal with. We make no recommendation with regard to this, but merely call your attention to the provision.

Cost of construction is provided for under Paragraph 12, which contains very precise provisions for determining the price. About the only thing left open is what is to be the "standard charge" of the district for delivering materials, etc., from one place to another.

Paragraphs 13 to 16 inclusive cover maintenance and operation, and the provisions contained therein appear to be so clear that they do not call for further explanation or comment.

Paragraph 17 is designed to provide for payment for electrical energy during the period between the termination of the former contract and the beginning of the proposed contract. Its provisions are clear, but there is an inconsistency as to dates which will have to be taken care of when the contract is executed. That is to say, the new contract contemplates that it be entered into as of January 1, 1918, and this paragraph recites that the district has supplied such energy to March 31, 1918. Thus the date of making the contract would antedate some of the things alleged to have been done.

Paragraphs 18 to 23 inclusive have to do with operation and maintenance and do not call for comment on our part, since we are not qualified to advise you in regard to these provisions. They appear to be in plain language and require no interpretation.

The provisions in Paragraph 24 are somewhat vague. It is, of course, to the interest of the city as well as the Sanitary District to maintain the equipment at a high standard. Hence, there is no objection to the general terms used, but our point goes to the fact that no one is named who shall have the deciding voice as to whether these general provisions are lived up to. We suggest that the same method be followed as in the case of determining electrolysis damage.

Paragraphs 25 to 29 inclusive relate to rates, payments, measurements, etc., and are in plain language. They require no interpretation and there are no legal questions involved in their application.

There are some slight changes of a verbal nature to be made in Paragraphs 28, 29 and 30 which have already been agreed upon.

Paragraphs 30 and 31 relate to the interruption of the service on account of strikes, riots, etc., and to the adjustment of price in case of such interruption. We are unable to advise you as to whether the provision for non-payment of "the average of the maximum demand" is the most practical way of arriving at an adjustment. Otherwise the paragraphs are unambiguous.

Paragraph 32 calls for no comment on our part. We suggest that such slight verbal changes be made in Paragraph 33 as will make it clear that it refers to the work mentioned in Paragraph 32, if that is the intention of the parties. Likewise, with reference to Paragraph 34, we believe it should clearly show that it applies to all work and not merely to the work provided for in the two preceding paragraphs.

Paragraph 35 relates to payments for costs of construction and contract costs. With the exception of a slight verbal change in sub-paragraph C, its provisions are plain, although there seems to be an unnecessary repetition. We make no comment on Paragraph 36, which relates to the approval of bills for construction work, nor on Paragraph 37 under which an expenditure of the Union Station Co. is taken care of.

Passing over Paragraphs 38 to 42 inclusive for the time being, we note that provision is made in Paragraph 43 for paying claims of \$50 or less by either of the parties when not liable without notice to the party liable. This provision, as well as the one in Paragraph 44, is so intimately connected with the fixing of liability under the preceding paragraphs that it should be considered in connection therewith.

The provision for arbitration in Paragraph 45 and the

provision in regard to appropriations to be made by the City Council in Paragraph 46 require no comment on our part.

We will now take up Paragraphs 38 to 42 inclusive with reference to which you made special inquiry. These relate to the liability of the city for deaths or injuries, and they include within their provisions any like liability that may be incurred under Paragraphs 43 and 44, as above indicated.

Paragraphs 38 and 40 are designed to fix by agreement the responsibility for accidents resulting in personal injury or death, so that it may be determined in every instance arising in the future which of the two municipalities will be liable. Paragraph 39 is designed to wipe out all claims against the Sanitary District which arose in the past, twelve of such claims on which suits were started being specifically mentioned.

With regard to the general purpose in view in making the distinction as to future liability and in fixing responsibility on the city in the cases mentioned and all others that have occurred in the past, the intention was to avoid the complications that must necessarily arise where one party generates the electrical current and the other owns the distributing plant and distributes it. The courts have so frequently held that both parties are liable, in some cases even that the current generating party was solely liable, that persons who make claims for injuries almost invariably include both parties as defendants.

More recently the liability of the current generating party has been rather strictly defined, and the rule now is that a generating company which sells electric current to a distributing company and furnishes the current over a wire owned by the distributing company is not liable in case of accident unless it has knowledge of the negligence which causes danger and continues to supply the current. (*Pressley, Admx. v. Bloomington & Normal R. & L. Co.*, 271 Ill. 622.) Even under this new rule, however, cases will continually arise where both parties will be sued when only one can be held responsible, and other cases where the wrong party is sued.

It is contended by the Sanitary District that it should not be put to the expense of defending suits in cases where accidents occur on the distributing lines of the city, and the provisions of the contract which appear to be so distinctly favorable to the Sanitary District about which you inquire were inserted for that reason.

The city will be held solely responsible under Paragraph 38 for all damages resulting from electrolysis on the transmission lines running from the plant of the district to the substations of the city, although these will be maintained and operated by the district. The reason why this provision was inserted has already been stated. In addition to this the city will assume entire responsibility for the operation, maintenance and repair of its own equipment and lines of distribution over the entire lighting system of the city (except as to certain cables specifically excluded), also for the operation by the city of equipment of the district in the substations of the city and for the use by the city of conduits and poles of the district and space in the substations of the district. This may exceed the liability which would accrue against the city in case the law were strictly applied, but we doubt whether there will be much difference in the long run if the corresponding benefits and salvage are taken into consideration during a period of five years for which the contract is to run.

In view of the fact that the contract is not intended to be one for profit, we are of the opinion that there is nothing inequitable in these provisions. It is possible that a case may arise occasionally where negligence could be traced to the Sanitary District and liability fastened upon it; also other cases may arise where the liability is not so clear and yet the district would be held jointly with the city. If the city were to stand on the strict letter of the law in these particulars and would also refuse to assume the burden and expense of defending suits, the district could with good reason add to its charges or rates enough to make up the losses it would be likely to sustain. That is always done where a private company undertakes to furnish electrical energy

at a profit. Hence, in one way or another the city would pay. Under these circumstances, we find no objection to the city assuming the burden voluntarily. We recommend, in this connection, that Paragraph 41 be altered so as to include, as a proper subject of arbitration, any dispute which may arise as to whether any case comes within the expressly assumed obligation.

In the obligations assumed by the Sanitary District under Paragraph 40 the presumption is that with respect to the electrical equipment which the district uses for other purposes than city lighting it assumes as complete responsibility for accidents from lines belonging to the city as well as its own as the city assumes in the matter of street lighting, with the one exception of damage from electrolysis.

As stated above, we make no recommendation in regard to the assumption of responsibility for damage due to electrolysis. The contract makes the city, in a sense, liable for damage done by other corporations, although it will have its action over. Whether or not the city should assume this burden depends altogether on whether the benefits derived by it from the contract taken as a whole are of such a substantial nature that it is worth while to assume this risk as far as the damage to the district from this cause is concerned.

Paragraph 39 of the proposed contract not only makes more specific the manner in which the city has to assume costs and expenses in the cases provided for under Paragraph 38, but it also provides generally that all such causes of action as may have arisen in the past will be included among those for which the city assumes sole responsibility, and it particularly names twelve cases which are now pending in which the city will hold the district harmless from all judgments, damages, costs and expenses sustained by it.

The proposed provision expressly avoiding all liability on the part of the Sanitary District and the placing of same on the city with respect to these twelve cases was a matter of deep concern to us, especially in view of the fact that in one of these cases there has already been rendered a ver-

dict of \$25,000. This verdict, when announced by the jury was jointly against the city and the Sanitary District, but the court granted a new trial to the Sanitary District and entered judgment against the city from which the city appealed, and the case is now pending awaiting the outcome of the appeal.

It would be a matter of great embarrassment for the Law Department to take the position in this opinion that it would be fair and equitable for the city to assume the entire burden as to these cases and then, if this contract is not entered into, later on undertake to defend these suits in the usual way—that is to say, so as to avoid a judgment against the city while it leaves the Sanitary District to defend as best it may.

We, therefore, feel that it will be better for us to state briefly the gist of these cases so that your committee may understand what the city will assume. Incidentally, we are willing to say that as a general proposition the city appears to be the party that is primarily liable in such of these cases as there is liability at all. Our information concerning most of them comes from the investigations made in the city attorney's office. It may be that when the cases are tried the facts will be somewhat different, but generally speaking we believe the information obtained by the city investigators is reliable.

The case of Bertram Stedwell is the one in which the judgment mentioned above has been rendered. The plaintiff is a boy who climbed a pole of the elevated structure at Langley avenue and 40th street, and received burns of a very serious nature.

The case of John Stedwell, the father of the plaintiff mentioned above, is for loss of services. This case has not yet been tried.

In the case of Edward Salow the plaintiff is a boy who climbed an electric light pole, containing a city light, on the south side of Elm street between numbers 649 and 653. This case has not yet been tried.

The case of Bishop, Administrator of the estate of Ar-

thur R. Anderson, arose out of the decedent, a boy, climbing a tree and coming in contact with an electric wire in front of 3013 Parnell avenue. In this case the court directed a verdict of "not guilty."

The case of Arthur Meyer was also a case of a boy climbing a tree. This accident occurred in front of 2631 North Albany avenue. The electric wire which caused the injury was a city light wire.

The case of John Mange was one in which a boy was injured by reason of a city light wire. This case was settled and the Sanitary District was dismissed out of the same.

The case of Lucy Potter was one in which the injury resulted by reason of the plaintiff falling into a trench. There was a judgment of \$1,500 against the city, which has been appealed. Notice was given to the Sanitary District that the city would begin an action against it in case the judgment stood. So that in this case at least the records seem to indicate that the Sanitary District was liable, although it was doing work for the city.

The case of Lillian Rice was one where the plaintiff was injured in front of 1352 Mohawk street by a bracket which either fell off or was knocked off from a city electric light pole.

The case of Hans C. Anderson was another case of a boy climbing either a pole or the elevated structure. The accident occurred at Englewood avenue between Princeton and Wentworth avenues. The electric wire was a city lighting wire.

The case of Edward Ottenhoff was a similar accident occurring at the corner of Leavitt street and Washburne ave. The plaintiff climbed a pole and was injured by a city light wire.

The case of Fowler, Administrator of the estate of Leo Kasmala is another one growing out of the climbing of an elevated structure. This accident occurred at Western avenue and 20th street and resulted from a city light wire.

The case of Joseph Kamerman was one caused by a city

electric wire or lamp post. This is not mentioned in the list contained in the proposed contract but would undoubtedly be classed along with the rest. We mention this case because it is possible there is divided responsibility. The accident resulted in instant death.

From the above it will be seen that in most cases the injuries resulted from wires used by the city for lighting purposes, only one of the cases mentioned being of a different character. The fact that these accidents spring from this cause is important in determining the question whether the city would want to assume the liability. In our opinion, no great amount can be gained by having liability determined under the law in each case because it would necessitate a readjustment of rates and charges that might result in as much expense to the city as if it assumed the burden in the first instance.

Paragraph 41 provides for submitting questions of liability, where they are not specifically assumed by respective parties, to arbitration, and Paragraph 42 relates to the manner in which notice shall be given and payments shall be made where the liability is assumed. We believe that these two paragraphs are entirely proper if the city and the district will assume the responsibility fixed upon them respectively by the contract.

We have gone over this contract and commented on same at great length, believing that it is of sufficient importance to warrant such an analysis as we have made.

The matters that we have pointed out should enable the committee to arrive at a full understanding of same.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Bequest of Ada J. Biggs.

November 19, 1918.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

You sent to us certain Council files relating to the bequest made by the late Ada J. Biggs for the purpose of forming a trust for destitute orphan and homeless girls.

The sum of \$10,000 was bequeathed to the City of Chicago under the terms of the will of the decedent filed for probate in the County Court of Henry County, Illinois, said sum to be held in trust by the city and the proceeds to be used for the benefit, care and support of destitute orphan and homeless girls, as a memorial to her son J. Lloyd Armstrong, and to be known as the J. Lloyd Armstrong Fund.

We are advised that the following is the provision in the will with reference to this legacy:

"I devise and bequeath to the City of Chicago, State of Illinois, to hold in trust, the sum of Ten Thousand (\$10,000) Dollars in cash from the proceeds of my estate, to be known as the J. Lloyd Armstrong Fund, in memory of my beloved deceased son, J. Lloyd Armstrong, to be used as follows:

"That is to say, that the said Ten Thousand (\$10,000) Dollars shall be placed at an interest bearing income, which income from said Ten Thousand (\$10,000) Dollars shall be used for the benefit, care and support of destitute orphan and homeless girls, between the ages of five and fourteen years of age; no part of said principal, interest or income shall be used for the erection, building or maintaining of any building, but to be used strictly for purpose as above stipulated and for no other purpose whatever."

You state that the Finance Committee suggests the deposit of this money, when it is received, with the city comptroller and that the interest from the fund be expended under the direction of the Morals Court, and you request that the necessary ordinance covering the acceptance of the bequest and the disposition of the same be drafted. You also say

that if we desire to make a recommendation of a better mode of operation we should do so.

The only change that we would suggest is that, instead of making the fund subject to the disposition of the Morals Court, it be expended under the direction of the Chief Justice of the Municipal Court, the judge of the Morals Court and the judge of the Court of Domestic Relations, or any two of them. Our reason for this is that the bequest states that the proceeds shall be used for the benefit, care and support of destitute orphan and homeless girls between the ages of five and fourteen years of age. To place the matter under the control of the Morals Court would have the effect of limiting the expenditure from this fund to beneficiaries who are older than was contemplated by the testatrix in making the bequest.

We have, therefore, prepared an ordinance accepting the trust and making disposition of same along the lines suggested above, and we transmit the same herewith for your consideration.

We judge from parts of the correspondence in our possession that some question has been raised as to the authority of the city to accept a bequest and trust of this kind.

There is, however, no difficulty in the way of doing this in the case of a bequest made for some public purpose germane to the objects of the corporation (Dillon on Municipal Corporations, 5th ed., Sections 981 and 982; McQuillin, Municipal Corporations, Section 1128).

We return herewith Council file mentioned above.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Increased Freight Rates.

November 22, 1918.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your request for an opinion as to the right of contractors to demand increased compensation owing to the increase in freight rates under General Order No. 28, issued by the United States Railroad Administration, which became effective June 25, 1918.

We know of no reason why any such demand should be allowed in the absence of a clause in the contract providing for extra compensation in such an event. In the case of the contract for coal such provision was inserted, but there is no similar provision in the contracts for sand or gravel which you submitted.

The order mentioned above was issued in pursuance of authority vested in the director general of railroads by the Act of March 21, 1918, relating to Federal control of railroads. Under Section 10 of that act new freight rates, classifications, etc., may be made, but there is no mention in that or any other section of the act to the effect that a change in freight rates shall operate so as to alter existing contracts between parties who ship and parties who receive such freight. Nor is there any other general statute of the United States which has the effect of altering such contracts on account of increased or reduced freight rates.

Such being the case, the change in the freight rate is no different than the change in price of labor or any other element that enters into the cost of the commodity. The contractor is bound by his contract regardless of fluctuations in price which may affect his profits. This rule holds good even where a law passed subsequent to the making of a contract makes performance more burdensome. (9 Cyc. 631.)

We are of the opinion, therefore, that unless there is a provision in the contract which contemplates a change in the contract price where the freight rate is changed, no extra

compensation can be allowed on account of the order in question.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

License to Sell Cigarettes.

November 25, 1918.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your communication forwarding to this office the application of the United Cigar Stores Company for a license to sell cigarettes in the premises known and described as 1958 West Madison street, which application has been rejected by the Police Department because the premises in question are within 600 feet of the Lewis Institute, an educational institution.

We are inclined to the belief that the objection of the Police Department to the granting of this license is based upon Section 733 of The Chicago Code of 1911, which provides that no person or corporation shall sell, give away, barter or exchange or otherwise deal in cigarettes, tobacco or tobacco products at any place within 60 feet of any school house or building used for school purposes, and in order to ascertain whether or not the objection of the Police Department to the granting of a cigarette license to the above named applicant is well founded, it is necessary for us to decide whether or not the Lewis Institute is a school house or building used for school purposes within the meaning of Section 733 of The Chicago Code of 1911.

The Supreme Court of Virginia in the case of *Northrup v. City of Richmond*, 105 Va. 335, in discussing what a school is, said:

“A school is a place of primary instruction; an establishment for the instruction of children; as a primary school, a common school, a grammar school.”

In discussing what a school is, the Supreme Court of the State of Wisconsin in the case of *State v. Kalaher*, 145 Wis. 233, said:

“A school is an institution of learning below a college or university, a place of primary instruction and generally refers to common or public schools maintained at the expense of the public, and is a generic term and denotes an institution for instruction or education and is not measured by the walls of the building.”

Upon investigation it appears that the Lewis Institute has no pupils under the age of 16 years, and that the primary or grammar grades that are generally taught in our public schools are not taught at the Lewis Institute.

It is our opinion that the object of the City Council in passing Section 733 was to make it difficult for young children to purchase cigarettes from stores in the immediate vicinity of our public schools, and we do not believe that the Council intended to include within the meaning of said ordinance colleges or institutions attended exclusively by persons over 16 years of age.

We are informed that cigarette licenses have been heretofore granted to persons licensing them to sell cigarettes at locations within 600 feet of the Lewis Institute, and that there is now a store in the same building as the Lewis Institute where cigarettes are sold under a license issued by the City of Chicago. We are inclined to the belief that the licenses heretofore issued have been issued properly, and we do not believe that it is a valid objection to the granting of a license to sell cigarettes that the place for which the license is desired is within 600 feet of the Lewis Institute.

We, therefore, recommend that the application of the United Cigar Stores Company of America for a license to sell cigarettes at 1958 West Madison street be granted and that a license issue.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Status of Aldermen Elected Sanitary Trustees.

November 29, 1918.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

At the regular meeting held November 18, 1918, Your Honorable Body passed the following order:

“ORDERED, That the Corporation Counsel be and he is hereby directed to prepare within the next five days and submit to the City Council at its next regular meeting an opinion as to the eligibility of Harry E. Littler and Willis O. Nance to hold the offices of alderman of the City of Chicago and trustee of The Sanitary District of Chicago at one and the same time.”

In reply to the above order, we beg leave to advise Your Honorable Body that Section 5 of Article III, Chapter 24, Hurd's Revised Statutes of the State of Illinois, 1915-1916, page 300, provides as follows:

“No person shall be eligible to the office of alderman unless he shall be a qualified elector, and reside within the ward for which he is elected, nor shall he be eligible if he is in arrears in the payment of any tax or other liability due to the city; nor shall he be directly or indirectly interested in any contract whatever to which the city is a party; nor shall he be eligible if he shall have been convicted of malfeasance, bribery or other corrupt practices or crimes; nor shall he be eligible to any office, the salary of which is payable out of the city treasury, if at the time of his appointment he shall be a member of the City Council nor shall any member of the City Council at the same time hold any other office under the city government; nor shall he be either directly or indirectly, individually, or as a member of a firm, engaged in any business transaction (other than official) with such city, through its mayor or any of its authorized boards, agents or attorneys, whereby any money is to be paid, directly or indirectly, out of the city treasury to such member or firms.”

In 1905 the General Assembly of the State of Illinois passed an act amending the charter of the City of Chicago

by adding thereto an article to be known as Article XII, which said amendment was submitted to and adopted by the people of Chicago at a general election.

Section 2 of Part Three of said Article XII, page 328, Hurd's Revised Statutes of the State of Illinois, contains the following provision:

“MEMBER OF CITY COUNCIL NOT TO HOLD OTHER CIVIL OFFICE—EXCEPTION.) No member of the City Council shall at the same time hold *any other* civil service office under the federal, state or city government except in the National Guard or as a master in chancery or notary public, and except such honorary offices as go by appointment without compensation.”

In order to pass upon the question of the eligibility of Messrs. Littler and Nance to hold the office of alderman of the City of Chicago and the office of trustee of The Sanitary District of Chicago, it is necessary for us to construe the language used in Section 2 of Article XII of the Little Charter of 1905, and to ascertain whether or not the office of trustee of The Sanitary District of Chicago is a civil service office and an office under the federal, state or city government. In defining the term “civil service,” Vol. II of *Corpus Juris*, says:

“This term (civil service) properly includes all functions under the government except military functions. In general it is confined to functions in the great administrative departments of state. In its enlarged sense the term means all service rendered to and paid for by the state or nation or by political subdivisions thereof, other than that pertaining to naval or military affairs; all offices and positions of trust or employment in the service of the state or of such civil division or city except offices and positions in the militia and the military departments.”

In construing the term “civil service” in the case of *Callaghan, Mayor, et al. v. McGowan, Police Commissioner*, the Court of Civil Appeals of Texas, 319 S. W. Rep., page 322, says:

“‘Civil service’ in its enlarged sense means all services rendered to and paid for by the state or nation or

by political subdivisions thereof, other than pertaining to naval or military affairs.”

And this same construction upon the term “civil service” has been approved of by the Supreme Court of the State of Louisiana in the case of *Pope v. City of New Orleans*, 30 South, page 842.

In view of the foregoing authorities, we are constrained to hold as a matter of law that the office of trustee of The Sanitary District of Chicago is a civil service office within the meaning of Section 2 of Article XII of the Charter of the City of Chicago.

In regard to the question as to whether or not it is an office under the federal, state or city government, we have made an exhaustive search. Dr. Mack, in discussing this question in Vol. 29, *The Cyclopedia of Law and Procedure*, says (p. 1384):

“The question has often arisen as to whether a provision prohibiting one holding a lucrative office in the United States or a state government from holding another lucrative office ‘under the state’ applies to municipal offices, or other offices popularly considered to be local offices. * * * But if an officer who is mainly municipal has duties to perform under state laws he is regarded as holding an office ‘under the state,’ and frequently, because of the application of this rule, offices commonly considered to be local, such as town offices, are held to be within the prohibition.”

In discussing this question the Supreme Court of Indiana, in the case of *Chambers v. the State*, 127 Indiana, where the Constitution provided that no one person shall hold two lucrative offices under the state, said (page 366):

“It is held in *State, ex rel. v. Kirk*, 44 Ind. 401, that the office of councilman in a city is purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the state, and although the office is a lucrative one it is not a lucrative office within the meaning of Section 9, Article 2, of the Constitution of the state. In *Mohan v. Jackson*, 52 Ind. 599, it is held that the office of city clerk is not an office within the meaning of Section 16, Article 7, of the Constitution of the state.

“It must, therefore, be regarded as the settled law of this state that if an office is purely municipal, the officer not being charged with any duties under the laws of the state, he is not an officer within the meaning of the Constitution, but if the officer be charged with any duties under the laws of the state, and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution. This, although it may be a narrow construction of the Constitution, must be regarded as settled. It then remains to be determined whether the office of school trustee of an incorporated town is charged with any duties under the laws of the state such as make the office a lucrative one within the meaning of the Constitution.

“It has been held by this court that the office of township trustee, who is also school trustee, and the office of supervisor, are lucrative offices within the meaning of Section 9, Article 2, of the Constitution. * * * The legislative department could not discharge this duty unless all school officers were subject and amenable to the general laws of the State, and as said in *State, ex rel. v. Haworth*, 122 Ind. 462: ‘Every school that has been established owes its existence to the legislation; and every school officer owes his authority to the statute.’”

The leading case on this subject is to be found in 112 Mich. Supreme Court Reports—the case of the *Attorney General v. The Detroit Common Council*. From a reading of the above case it appears that one Hazen S. Pingree had been elected mayor of Detroit and, after having qualified as mayor of the city of Detroit, was elected to the office of governor of the state of Michigan. Section 15 of Article V of the Constitution of the State of Michigan provided:

“No member of Congress, nor any person holding office under the United States or this state shall execute the office of governor.”

In an exhaustive review of all the authorities upon the question of what constitutes an office under the state government, and after carefully reviewing the proceedings of the Constitutional Convention of the State of Michigan at which the above provision was adopted, the Supreme Court of Michigan adopted the doctrine laid down in the 127th Indiana, and held that it was a settled law that where duties were

imposed upon an officer by the statute of the state that such officer must be held as holding office under the state government, and the court held that Pingree as mayor of the city of Detroit was holding office under the state government of Michigan and that it was a violation of the Constitution of the State of Michigan for him to hold the office of mayor of Detroit and at the same time hold the office of governor of Michigan, and granted a writ of *mandamus* to compel the Detroit Common Council to call an election to elect his successor as mayor.

The Sanitary District of Chicago has been created by an act of the General Assembly of the State of Illinois, and all the power to be exercised by the trustees of The Sanitary District of Chicago has been conferred upon them by the General Assembly of the State of Illinois, and they are required to make to the governor and both branches of the Legislature full, complete, accurate and itemized reports of all receipts and expenditures of moneys made by them, together with a copy of all contracts for the expenditures of moneys to be made by such trustees, and the two branches of the Legislature of this state separately, and the governor and either branch of the said Legislature of this state shall have the right to examine the books of said trustees and all expenditures made by or in any such district by committee or otherwise, and to call for further reports, accounts, items and copies of all contracts made by or documents held in the possession of any such trustees. Upon the failure or refusal or neglect of any such trustees to accurately and completely furnish any and all such items, accounts, documents and reports of contracts as provided in this act, any and all trustees of any such Sanitary District shall forfeit their office, and by a writ of *quo warranto* be ousted and removed therefrom.

By an act of the General Assembly of the State of Illinois, approved and in force July 1, 1893, the General Assembly provided:

“That The Sanitary District of Chicago shall have the right and power to appoint and support a police force, the members of which may have and exercise po-

lice powers, over and within its right of way and for a distance of one and one-half miles on each side of its main drainage channel, such police powers as are conferred upon and exercised by the police of organized cities and villages; but such police force, when acting within the limits of such city or village, shall act in aid of the regular police force of such city or village, and shall then be subject to the direction of its chief of police, city or village marshals or other head thereof."

(Page 409, Hurd's Revised Statutes, 1915-1916.)

From the foregoing it clearly appears that the Board of Trustees of The Sanitary District of Chicago is an agency of the state, and we must hold as a matter of law that a person holding the office of trustee of The Sanitary District of Chicago is holding office under the state government.

In the Pingree case the Supreme Court of Michigan, after an exhaustive review of this subject by the various Supreme Courts of the Union, said (112 Mich., p. 145, at 153):

"These cases proceed upon the theory that all officers whose duties are prescribed by general law, however trivial, perform their own particular portion of the business of the state. The levying and collection of taxes are state matters. So are all things connected with the state system of schools, construction and maintenance of public highways, and the preservation of the peace, and these cases hold the generally conceded doctrine that all who have parts to perform in the general scheme are officers holding under the state, if their engagement rises to the dignity of an office rather than a mere employment."

From the language used in Section 2 of Part Three of Article XII, in which the Legislature said that "No member of the City Council shall at the same time hold *any other* civil service office," it appears clear to us that the General Assembly considered the office of alderman of the City of Chicago to be a civil service office, and this provision of the law clearly indicates that the General Assembly did not intend an alderman to hold any other civil service office under the federal, state or city government. The language is not that *no member of the City Council shall hold any civil service office*, and if the General Assembly did not consider

the office of alderman of Chicago a "civil service office" they would not, in our judgment, have used the words "other civil service office." The conception that the General Assembly had of what constituted a civil service office is the same as laid down by the authorities in every state where the question has been raised, and there is no doubt in our minds but that the office of alderman of Chicago and the office of trustee of The Sanitary District of Chicago are both civil service offices.

On December 14, 1914, the corporation counsel of the City of Chicago ruled that the office of alderman of the City of Chicago and the office of trustee of The Sanitary District of Chicago were incompatible offices and could not be held at the same time by the same person. We do not feel called upon to discuss the question of the incompatibility of the offices because, regardless of whether or not the offices are incompatible, we are satisfied that the law is clear and that the provisions of Section 2 of Article XII of the Little Charter adopted in 1905, prohibiting an alderman from holding any other civil service office under the federal, state or city government, prohibits Messrs. Littler and Nance from holding the office of alderman after qualifying as trustee of The Sanitary District of Chicago.

It is our opinion that the mere act of a member of the City Council in qualifying as trustee of The Sanitary District of Chicago *ipso facto* automatically removes the person so qualifying from the office of alderman of Chicago, and that from the time of an alderman of Chicago qualifying as trustee of The Sanitary District of Chicago a vacancy exists in the office of alderman heretofore held by the person so qualifying as trustee of The Sanitary District of Chicago.

We, therefore, respectfully report to Your Honorable Body that the Honorable Harry E. Littler and Honorable Willis O. Nance are ineligible to hold the offices of alderman of Chicago and trustee of The Sanitary District of Chicago at the same time.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Destruction of Canceled Bonds.

December 13, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your letter of recent date, in which you inquire whether the comptroller may destroy canceled bonds without impairing the legal sufficiency of the records of same and also whether Council authority is necessary to do so.

It appears that there are in your vaults many thousand canceled municipal bonds which have been paid in full, many of them having matured years ago. You state that it is increasingly difficult to find sufficient vault space to properly store your records, and that if these bonds could be destroyed by burning, it would make available a considerable amount of space that you need. You further state that it is not your intention to destroy by burning or otherwise any bonds unless the entire series of the particular maturity has been paid and canceled.

We know of no reason why canceled papers of this kind, which have long since ceased to have any value, either on account of their contents or as records, should be kept indefinitely. The law does not require it.

The documents that you speak of are not in any sense of the word records of the municipality. Unless we find some provision of the statutes which requires that they should be kept, there is no duty imposed on the city's officers to retain them, except for the protection of the city against unjust claims while there is a possibility of such claims being made.

Under Section 10 of Article VI of the Cities and Villages Act, the clerk is required to keep all papers belonging to the city, but we are satisfied that a proper interpretation of that section would not include such papers as you speak of.

There are some other general provisions of a somewhat similar nature to be found in the statutes, but none of them mention particularly the kind of documents that you speak of, with the exception of Section 19 of Article 7 of the Cities and Villages Act, which reads as follows:

“§19. The comptroller, when there shall be a comptroller, and if not, then the clerk, shall keep in his office, in a book or books kept expressly for that purpose, a correct list of all the outstanding bonds of the city, showing the number and amount of each, for and to whom the said bonds are issued; and when any city bonds are purchased, or paid, or canceled, said book or books shall show the fact; and in his annual report he shall describe, particularly, the bonds sold during the year, and the terms of sale, with each and every item of expense thereof.”

In view of the fact that the subject of a record of bonds issued by the city is specially treated by statute, and the section we quote contains all there is said on this point, we are of the opinion that no further requirements except those stated therein are imposed on the comptroller by way of keeping a perpetual record of bond transactions. Therefore, when bonds have been paid and a sufficient time has elapsed, so that it is certain that no claim will arise against the city on account of such payment, the canceled bonds may safely be destroyed. We believe that it would be better to have the Council authorize the destruction of the particular bonds in question, so that the record may show what was finally done with them, in case it should be necessary at some future time to ascertain whether they are in existence.

Our recommendation is that leave should be asked of the City Council to destroy canceled bonds which were paid more than five years ago, wherever the entire series of the particular maturity has been paid and canceled. Such request on your part ought to contain a sufficient description of the various issues and maturities which you intend to destroy, so that the record of their destruction may be complete. A resolution or order of the City Council will be sufficient. It does not require an ordinance, the purpose being merely to have a record.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Monogram on Lights of Taxicabs.

December 13, 1918.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

Your communication dated December 9, 1918, asking the corporation counsel of the City of Chicago for an opinion as to whether or not, under the ordinances of the City of Chicago, The Yellow Cab Co. can place a transparency of its monogram on the front glass of each of the pillar lamps on their taxicabs, has been referred to me for attention.

The sample lamp which has been submitted conforms at the present time to Section 2596 of The Chicago Code of 1911. The language of Section 2596 relative to a "plain glass front and sides" was undoubtedly inserted in said section for the purpose of prohibiting frosted or colored glass of various kinds and to require the maintenance of a sufficient visibility for the protection of pedestrians, users of such public automobiles, and other vehicles upon the public highways.

The section above referred to must be considered in conjunction with Section IV of the Motor Vehicle Act of 1911, inasmuch as the ordinances of the City of Chicago relative to traffic and other regulations must not be inconsistent with said act.

Section IV of the Motor Vehicle Act provides:

"When upon any public highway in this state, during the period from sunset to one hour before sunrise, every motor bicycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights visible at least two hundred (200) feet in the direction toward which each motor bicycle or vehicle is proceeding, and shall exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction etc. * * *"

It will be noted that the statute requires a sufficient visibility of the lights for a given distance in the direction in which such vehicle is proceeding and that said lights must be white lights. The words "white lights" must be given their

commonly accepted interpretation, *i. e.*, lights that are commonly designated as white, but which may vary from the bluish white light of the mercury lamp to the yellowish light of a dim carbon filament electric light.

In an opinion by the Honorable Edward J. Brundage, Attorney General of the State, on this subject given to the Honorable Louis L. Emmerson, Secretary of State, under date of December 4, 1917, mention of which has been made heretofore in an opinion of this department, it was stated that "a reasonable construction should be given to the law, as, strictly speaking, there is no such thing as a 'white light.' "

It is my opinion that no objection could be made to the placing of the transparency of the Yellow Cab monogram upon the lamps required by Section 2596 of The Chicago Code of 1911, provided that the transparency is of such a nature that it does not interfere with the visibility of the lamp as required by Section IV of the Motor Vehicle Act, and just so long as the color continues to be that which is commonly known as white.

Yours very truly,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Interest on Special Assessment Vouchers.

December 17, 1918.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We have your inquiry of recent date relative to the payment of interest after maturity on certain special assessment vouchers which were not paid on the day they fell due by reason of lack of funds.

It appears that you issued special assessment voucher No. 827 on Warrant No. 42930 for improving Western avenue from 56th to 63rd street; that the same was for \$1,469.04

with interest at five per cent from December 28, 1916, to December 28, 1917, as per the contract of Smith & Browne Co., contractors; that on December 28, 1917, there were practically no funds in the warrant with which to pay the voucher, but that interest was paid up to that time; that there are now sufficient funds to pay the principal, together with interest to date, if the holder of such voucher is entitled to the interest. The point you want determined is whether the city is liable for interest on this paper after maturity.

We are of the opinion that the voucher in question bears interest up to the time that the collections brought sufficient money into the city treasury to pay the principal and interest. As soon as there was enough to do that the voucher ceased to bear interest.

The question seems to have been definitely decided in the case of *Village of Wilmette v. People ex rel. Farm Land Mortgage Co.*, 214 Ill. 107. In that case it was held that it was the duty of the holder of a special assessment voucher to ascertain when sufficient money had been collected to pay the principal and interest and to demand payment, and that it was not the duty of the municipality to notify the holder of the fact that there was enough money to pay him. It was further held in that case that the interest which the holder of such a voucher is entitled to receive is that, and that only, which the property owners are required by law to pay in order to discharge the lien against their property, and that interest upon such a voucher ceases when money legally applicable to the payment of the voucher has reached the treasury of the municipal corporation.

This ruling was later affirmed in the following cases:

City of Chicago v. Hurford, 238 Ill. 552.

Wells v. Village of Wilmette, 193 Ill. App. 30-42.

It will therefore be necessary for you to find from your record when there was sufficient money to pay the principal and interest on the voucher in question. Up to that date the

voucher draws interest. Beyond that date there is no liability against the city.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Bill of Frandsen Construction Co.

December 30, 1918.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We have your communication of December 18, 1918, *in re* bill of the Frandsen Construction Company for steel as per certain attached specifications. You state that upon weighing the material furnished you find it to be 3,913 lbs. less than the total weight of 26,100 for which you are billed, and that when the attention of the Frandsen Company was called to this they stated that it was customary to bill for weight as per plan and make no allowance for cutting or rivet holes. You state further that you are of the opinion that you should pay for actual weight only, and you desire an opinion as to whether or not your position is correct.

We have examined the specifications accompanying your communication and also the contract for furnishing this steel.

The contract at lines 6 to 29 inclusive, provides as follows:

“Witnesseth, that the said party of the first part, in consideration of the payments to be to it made by the City of Chicago, as hereinafter set forth, hereby agrees to furnish and deliver to the City of Chicago at the Chicago avenue loading station located at Chicago avenue and the Chicago River

“Two Hundred (200) Center Braces.

Four Hundred (400) Side Braces (Right Hand).

Four Hundred (400) Side Braces (Left Hand).

“All of said braces shall be strictly in accordance with the specifications which are attached hereto and made a part of this contract.”

The contract at lines 44 to 46 inclusive further provides as follows:

“The said party of the first part further agrees to furnish and deliver the said braces under the immediate direction and superintendence of the commissioner of public works, and to his entire satisfaction, approval and acceptance.”

The contract at lines 61 to 65 inclusive provides as follows:

“The City of Chicago hereby agrees, in consideration of the covenants and agreements specified to be kept and performed by the party of the first part, to pay to said party of the first part when this contract shall be wholly carried out and completed on the part of said contractor the following prices: *The sum of Nine and seven-tenths (\$0.97) cents per pound.*”

Upon investigation we find that the Frandsen Company has sold steel to the city in the past by weight and that the payment was made on the basis of actual shipping weights. Moreover, such investigation as we have been able to make indicates that the custom is otherwise than that claimed by the Frandsen people in their letter.

We have also examined the specifications which provide that the material shall conform to the “Standard Specifications for Structural Steel for Buildings, of the American Society for Testing Materials,” adopted 1901, with revisions to date, and that the workmanship shall conform to the “American Bridge Company Specifications for Steel Structures,” adopted 1912 and published on pages 159 and 160 of the 18th edition of the Carnegie Steel Company’s Pocket Companion, and we find nothing in either of these publications to indicate that payment should not be made on the basis of actual shipping weight.

In view of the foregoing, and there being no provision in the contract requiring the city to pay on any other basis, we are of the opinion that the city should pay the Frandsen Company on the basis of actual shipping weight.

Yours very truly,

SCOTT M. HOGAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Lease of Space on Municipal Pier to the Federal Government.

January 11, 1919.

HON. CHARLES R. FRANCIS, Chairman, Harbor Board.

Dear Sir:

We are in receipt of your letter in which you inquire whether the city has the right to enter into a lease with the United States government by which the available space on the Municipal Pier will be used for the storage of motor equipment for war purposes.

It appears that the Federal authorities have applied for all the available space on the pier for the period ending with the government fiscal year, June 30, 1919, with an option for renewal for one year thereafter, subject to cancellation by the lessee on thirty days' notice in writing; that the Federal government has approximately \$6,000,000 worth of motor equipment in the vicinity of Chicago for which there is no available storage room and which is rapidly deteriorating because of exposure; that the proposed term and provision for cancellation are necessary conditions on account of the limitations on the power of the Federal officers to contract.

You state that there is available on the municipal pier about 600,000 square feet of space for which the Harbor Board has fixed a rate of 20 cents per square foot per annum. We are further informed that the Federal authorities are willing to pay the price that you have determined upon, that it would be desirable for the city to lease the space in question to the national government if it can be done lawfully, and that in the judgment of the Harbor Board there is no good reason why these war needs of the government should not be accommodated unless there is some legal obstacle to prevent it.

You have indicated that you are in doubt as to whether the city has the right to enter into this arrangement with the Federal government by reason of provisions in Section 3 of the Harbor Act (Hurd's Rev. St. 1915-16, pp. 521-2), which read as follows:

“Provided, however, that except as to railroad facilities at least one-third of the capacity of each such utility shall not be leased for a period to exceed one year and that at least one-half of said one-third shall at all times be reserved by such city or village for general public use, and that not to exceed fifty per cent in capacity of the remaining two-thirds capacity of each such utility shall be leased to any one person or corporation; provided, further, however, that no leases authorized under this act shall contain conditions which shall admit of any unjust, undue or unreasonable preference or discrimination between lessees.”

We are of the opinion that the above provisos have no application to the renting of space to the Federal government for the purpose indicated.

Aside from the fact that the Federal authorities have the undoubted right to commandeer this space if required for war purposes, it is plain that the intention of the Legislature was to prevent the monopolizing of available space for private purposes, and that it was not the intention to make any restriction on its use for public purposes. The reservation of at least one-sixth of the whole space available for general public use is to be regarded as a minimum reservation. In fact, it is doubtful whether a provision which would restrict the amount of space for public use would be constitutional.

The use intended in the present instance is a public use, and while it may not be such a use as a pier or harbor facilities are intended to supply, nevertheless we can find nothing in the Harbor Act which will prevent the city from renting it to the general government for war purposes when it is not actually in use for harbor purposes.

We have, therefore, in pursuance of your request, drafted an ordinance authorizing the commissioner of public works to enter into the proposed lease, and we transmit same herewith.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Claim Against Bi-Lateral Fire Hose Co.

January 15, 1919.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication in reference to claim of the City of Chicago for liquidated damages on the contract of the Bi-Lateral Fire Hose Company. The contract for the delivery of 10,000 feet of 2½" cotton rubber lined fire hose of bi-lateral construction with couplings attached was entered into by the fire marshal on the 8th day of July, 1918, and provides that the delivery of said hose shall be commenced on or before the first day of August, 1918, to progress as follows, viz.:

From time to time such amount or amounts as may be ordered by the fire marshal and be finished or fully completed on or before the first day of September, A. D. 1918. The contract also provides,

"It is further agreed that all the said hose shall be delivered within the time fixed herein. Inasmuch as a failure to deliver said hose within the time specified therefor will work injury to the City of Chicago and as the damages resulting from delay in such delivery cannot be calculated with any degree of certainty it is hereby agreed that if the said hose is not delivered within the time specified, then there shall be deducted from the contract price and retained by said city as its ascertained and liquidated damages the sum of \$10 for each and every day passed after the date so fixed for delivery of said hose until the same is delivered complete."

We are advised that the delivery of the full order was not completed until 27 days after the first day of September, 1918, and that in making up the voucher for this contract your office deducted the sum of \$10 per day for each and every day delivery was delayed, making a total reduction of \$270 for the 27 days delivery was delayed.

From the facts at hand and communications attached to your letter, it appears that subsequent to the execution of this contract by the Bi-Lateral Hose Company the United States Government assumed charge of the factory of the

Bi-Lateral Hose Company and commandeered both their workmen and material on hand; that the United States Government had also placed an embargo on the shipment of fire hose; that the inability of this company to fulfill this contract in the time required was due wholly to the above facts and because the United States Government in placing war orders at the factory of the Bi-Lateral Fire Hose Company ordered said company to give war orders priority over any and all other business that said company had undertaken.

From the above and foregoing facts, we are of the opinion that this contract was extended by implication and that the City of Chicago could not successfully maintain a claim for the liquidated damages amounting to \$270.

Our opinion and conclusion are based on the facts in this case and are confined to the issues in this particular matter, as many claims will be made on similar matters, but all such claims must be treated separately.

We would, therefore, recommend that the voucher to the Bi-Lateral Fire Hose Company be made for the full amount of the contract price now due.

Very truly yours,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Practice of Phrenology.

January 30, 1919.

DANIEL WEBSTER, ESQ., Chief Assistant Prosecuting Attorney.

Dear Sir:

Your letter of January 25, 1919, requesting the corporation counsel to furnish an opinion as to whether or not it is a violation of the law of the State of Illinois or the ordinances of the City of Chicago for a person to practice the science of phrenology, and if a license is necessary for the

practice of same, was referred to the undersigned for an opinion.

From a cursory examination of the subject it appears that phrenology (from Greek words meaning mind and discourse) is a name given by Thomas Ignatius Forrester to the empirical system of psychology formulated by Frederick J. Gall and developed by his followers, especially by J. K. Spurzheim and G. Combe, by whom it was named craniscopy, craniology, physiognomy or zoonomy; that it is based upon five principles:

1. That the brain is the organ of the mind.
2. That mental powers of man can be analyzed into a definite number of independent faculties.
3. These faculties are innate, each having a seat in a definite region of the surface of the brain.
4. The size of each such region is the measure of the degree to which the faculty seated in it forms a constituent element in the character of the individual.
5. The correspondence between the outer surface of the skull and the contour of the brain surface beneath is sufficiently close to enable the observer to recognize the relative sizes of these several organs by the examination of the cranial surface.

Phrenology professes to be primarily a system of psychology, but its second and more popular claim is that it affords a method whereby the disposition and character of the subject may be ascertained. The relations between the size, conformation and contour of the human head and the character and propensities of the individual have been treated by anatomical and philosophical writers from the earliest times, but phrenology was first treated as a separate science by Frederick J. Gall in a work on the subject published at Paris in the year 1809.

The votaries of the system of Gall or the systems modified by other writers on the basis of the original, claim that by a proper understanding of the science, the propensities of individuals may be determined and that thereby their tendencies and adaptabilities may be specified and indivi-

duals may thus learn their capabilities as well and their limitations.

It is not claimed by phrenologists that events may be forecast by the use of the science and neither do they claim any occult qualities for the science, but merely that anatomical peculiarities of the human head indicate the strength and power of the faculties and propensities of the individual.

We find no specific law bearing on the subject. Neither can we find any statute or ordinance prohibiting the practice of the science of phrenology nor requiring a license. We are aware of the fact that certain persons pretending to be phrenologists really use phrenology as a means or device for the purpose of pursuing their true calling, that of "fortune-telling." The fact that they call themselves phrenologists would, under such circumstances, be insufficient to keep them from being subject to the following statute: (1917).

"An Act to prohibit fortune-telling and other practices whereby money is obtained on the pretense of the exercise of occult powers.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That whoever shall obtain money or property from another by holding himself out as skilled in fortune-telling by means of card reading, palmistry, clairvoyancy, astrology, seership, spirit mediumship or any crafty science, or by any other devices or practices whereby money is obtained from the general public on the pretense of the exercise of occult or psychic powers, shall for each offense be fined not exceeding five hundred (\$500) dollars. Provided, that the provisions of this act shall not be construed to include, prohibit or interfere with the exercise of the spiritual functions or offices of any priest, minister or accredited representative of any religion, and provided further the provisions of this act shall not be construed to include or refer to the practice of the belief known as spiritualism or to any attempted communication with the spirit world, by or through so-called mediums.

§2. That whoever knowingly prints, publishes, distributes or circulates, or knowingly causes to be printed, published, circulated or advertised, in any newspaper, periodical, magazine or other publication or publications,

or by display signs, circulars, handbills or any other means, any advertisement of any person's ability, skill or power in telling fortunes or revealing the future, or offering advice of any kind or nature by means of occult or psychic powers, faculties or forces, shall for each offense be fined not exceeding two hundred (\$200) dollars."

We are, therefore, of the opinion that the practice of phrenology is not prohibited by any existing law in Illinois nor is a license required for its practice.

Respectfully submitted,

ALFRED O. ERICKSON,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Bonds without Referendum.

February 3, 1919.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

Some time ago we forwarded to you draft of a bill which had for its object the issuance of bonds to the extent of \$4,000,000 without a referendum. It was so framed that it authorized bonds for the purpose of reimbursing the general corporate fund for expenditures made for permanent public improvements.

As stated to you by the writer before this draft was submitted to you, we were in grave doubt about the validity of such an act if passed, and in order that there would be no unnecessary waste of time and effort in the matter we submitted a copy of the draft to Messrs. Wood & Oakley, who would in all probability be called upon by the financial institutions of the city for an opinion as to the validity of the bonds before they became marketable.

In reply to our request, we received an opinion from said firm to the effect that they would regard bonds issued under such authority as void. They regard the form of the proposed

act as good in case the bonds were to be issued for a lawful purpose, but the point they raise is that the public improvements which were constructed by means of money from the general corporate fund have already been paid for by the taxpayers, and that the city has no right to issue bonds to compel the taxpayers to pay for them again.

This point seems to be good, and unless the bonds could be issued for the purpose of paying a debt that has not been extinguished or for purposes that would create a debt in the future that will have to be paid therefrom, there is no need of going any farther in the matter.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Excess Freight Charges for Contractors.

February 18, 1919.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

We are in receipt of your communication with reference to the payment of excess freight charges allowed contractors for material used by them on contracts ordered by the Board of Local Improvements.

It appears that at the time these contracts were entered into, the Board of Local Improvements had provided that in case the freight rates on material were increased there would be allowed to said contractors on the contracts entered into, in addition to the charges for the materials and work, the increased freight rates, if any, established subsequent to the entering into of these contracts; that all of said contracts on which claims for excess freight rates were made were entered into on and after April 3, 1918; that the claims for excess freight charges are for materials delivered subsequent to June 25, 1918, the date upon which the general order raising

freight rates was effective; that in each case there is an affidavit of the contractor attached in each of the bills for excess freight, and that such bills were checked up by the engineer for the board.

Section 73 of the Local Improvement Act and the contracts with the Board of Local Improvements provide that the contractor relies solely upon the Special Assessment Fund, and that if the special assessment proceedings or any vouchers or bonds are declared invalid the contractors must bear the burden and cannot successfully maintain action against the comptroller on account of said vouchers. *Wilmette v. People*, 214 Ill. 107; *Brede v. City*, 218 Ill. 528; and *Conway v. City*, 237 Ill. 128.

Pursuant to the agreement made with the contractors at the time of entering into their contracts, the Board of Local Improvements at its meeting on December 5, 1918, ordered that the contractors be allowed for the excess freight rates paid for materials delivered after June 25, 1918, on contracts awarded between April 3 and June 25, 1918, and the chief street engineer was directed to check up the bills and approve the allowances in his final estimates. Vouchers drawn in accordance with such final estimates are issued subject to the approval of the County Court when the certificate of facts is filed in said court under Section 84 of the Local Improvement Act, under which section a hearing is provided and the finding of the court on the facts stated in the certificate as to cost, completion of improvement, etc., is conclusive and not subject to review by appeal or writ of error.

Therefore, under the facts above stated, we do not believe that the comptroller assumes any responsibility in drawing vouchers in accordance with such final estimates and would be justified in issuing same.

Yours very truly,

GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Burglary and Holdup Insurance.

February 21, 1919.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

Your letter concerning the placing of bank burglary and holdup insurance in connection with the city treasurer's office was referred to the undersigned for consideration and reply.

It appears that you placed such insurance at the beginning the year in accordance with the usual custom, but when you offered the policies to the city treasurer he refused to accept them because he had placed the insurance for his office and intended to ask the Finance Committee of the Council to approve his action. Your inquiry is directed to the question of the legality of the proceeding of the city treasurer.

There is no doubt of the right of the City Council to authorize any officer which it sees fit to name to make the expenditure. It may put this authority in one officer one year and in another officer the next. It may also reserve control over contracts made prior to the passage of the appropriation bill each year, because no officer has the right to incur obligations without authorization before the appropriation bill is passed.

The City Council on January 13, 1919 (Council Journal, p. 1445), undertook to give authority to the heads of departments to incur necessary expenses on requisitions to be approved by the Committee on Finance. In case this expense had been incurred since then, it might be said that whatever officer took out the insurance took the chance of having his act repudiated if he did not first obtain the approval of the Committee on Finance.

The expense, however, was due to an emergency and was incurred before the City Council made provision for the manner in which it was to be incurred. The policies expired on the first day of January and it would have been gross negligence on the part of the officer charged with the duty of keep-

ing the city insured to allow it to run until January 13th without such insurance.

The order of December 30, 1918 (Council Journal, p. 1356), cannot be looked to as controlling the situation. It was passed before the Council itself had the right to authorize the incurring of expense without a preceding appropriation, but, even assuming that the order was lawful and binding in every respect, it clearly contemplated that the expenses which would be paid should be passed on after they were incurred. That is to say, the city comptroller and city treasurer were given authority by said order to pay bills that were approved by the Committee on Finance.

The question in its last analysis, therefore, is whether the city comptroller was justified in incurring an emergency expense and whether the city treasurer had the right to assume that the City Council would designate him in preference to the comptroller as the officer to place the insurance.

It is well settled that an officer may bind the city in an emergency. In the case of *Sheehan v. New York*, 75 N. Y. S. 802, it was held that the city was liable for material furnished for a green-house in a public park in anticipation of the possibility of frost on the order of the superintendent of parks, who had no authority to place such an order and who could not have bound the city except in case of emergency.

The lapsing of a policy of insurance of this kind prior to the making of an appropriation for same would unquestionably be held at least as great an emergency as the possibility of frost. Hence, the placing of the insurance by the officer who was in the ordinary course of business the one to place it was justifiable.

The question as to who was the proper officer to place the insurance is difficult, because the treasurer has the responsibility for the safe keeping of the money thrust upon him by law. If he had any reason to believe that the comptroller would fail to place insurance he would have been within his rights in securing the insurance. The statute which relieves him of responsibility for the safety of moneys placed in the city's depositaries according to law does not go so far

as to take responsibility from him for money in his office or on the way to and from the banks. Consequently, he is bound to take every precaution for its safety, even to the extent of incurring such an expense if he believes the insurance will lapse. If he had placed such insurance in the belief that otherwise the policies would lapse, even if the City Council had subsequently designated the comptroller as the officer to do so, the city would have been bound to pay. (See *North River El. Co. v. New York*, 48 N. Y. App. Div. 14.)

But in this case there does not seem to have been any reason for departing from the precedent set in former years. The treasurer placed the insurance without ascertaining whether an emergency existed notwithstanding the fact that the comptroller had been in the habit of placing it. The appropriation for the payment of the premiums on the insurance in question has been under the control of the comptroller for a long time, and the latter has been in the habit of placing such insurance. There was no occasion for apprehending a failure on his part to see that the risk was properly taken care of. Nor was there any reason for assuming that the City Council wanted a change made in this respect during the current year. Under such circumstances, in our opinion, the comptroller was the proper officer to place the insurance, and the city is not bound by the contract made by the treasurer.

Yours very truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

What Constitutes a Legal Appropriation Bill.

February 28, 1919.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter asking two questions with reference to the annual appropriation bill for the year 1919,

viz.: (1) What will be a legal budget (annual appropriation bill) for this year; and (2) whether it will be legal for the City Council, at this time, to pass an appropriation bill for the first six months of the year only.

Answer to the first question: The City Council not only *may* but *shall* (*City of Cairo v. Campbell*, 116 Ill. 305) "appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation", *i. e.*, the city.

On this question it is not a material legal question whether the city will or will not have enough revenue with which to pay such appropriations.

Answer to second question: The statute evidently contemplates that in general the annual appropriation bill shall cover the entire year and not merely six months thereof. The statutory provision allowing additional or supplemental appropriations, after the passage of the annual appropriation bill, contemplates supplying, out of miscellaneous receipts, deficiencies in the annual appropriation bill; it does not authorize the use of the annual appropriation bill to provide for the needs of the city for the first six months of the year, and then providing for the needs of the city for the last six months by additional or supplemental appropriations.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

FRANK S. RIGHEIMER,
Acting Corporation Counsel.

Status of J. Norman Jensen.

March 13, 1919.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire as to the city's standing with respect to the claim of J. Norman Jensen for one hundred twenty-one dollars and

thirty-three cents (\$121.33) as salary withheld during period from June 29 to December 31, 1917, inclusive.

It appears that on June 29, 1917, pursuant to an order of the Circuit Court, J. Norman Jensen was reinstated in the position of architectural engineer in the department of buildings, and that his civil service status entitled him to receive a yearly salary of \$2,400. That at the time of his reinstatement there were three such positions of architectural engineer in said department, occupied by the following named persons: Bernard E. Winslow, at a salary of \$2,160 per year; R. M. Gerety, at a salary of \$2,400 per year, and John Krippner, at a salary of \$2,400 per year. That the said R. M. Gerety and John Krippner, by reason of the status each of the same had acquired as civil service employes, were legally entitled to the positions they then occupied, to the yearly salary of \$2,400, appropriated for each of such positions, and could not be removed from their positions except for cause pursuant to the provisions of the Civil Service law and rules. That Bernard E. Winslow, who had been certified and appointed to the position of architectural engineer formerly occupied by Jensen, was laid off, and that on July 29, 1917, Jensen was reinstated in the position of architectural engineer last occupied by Winslow, for which the City Council had appropriated a salary of \$2,160 per year. That, except as to said sum of \$2,160, there were no other moneys then appropriated that could be applied in payment of any salary for such position, and no authority to pay any salary for such position for the year 1917, in excess of said sum of \$2,160.

While it appears that Jensen had the legal right to occupy such position, his right to exact of the city, for performing the duties of such position, a yearly salary of \$2,400, is conditional upon the same having been appropriated. *May v. City of Chicago*, 124 Ill. App. 527; *Gathemann v. City of Chicago*, 263 Ill. 292.

“Offices created by the statute are wholly within the control of the legislature, which may at pleasure create or abolish them, modify their duties, shorten or lengthen their terms, increase or diminish the salary or change the mode of compensation; and the power of municipal cor-

porations, within the limits prescribed by the constitution or by statute, is of the same absolute character."

Hughes v. Traeger, 264 Ill. 616; and cases therein cited.

He had no contractual relations with the city by which he could compel the city to pay him a salary at the rate of \$2,400 per year. He was not bound to continue to occupy such position and perform the duties thereof at a salary of \$2,160 per year; he would have violated no obligation by leaving the service of the city at any time, and the mere fact that for and during such period from June 29 to December 31, 1917, inclusive, he continued to occupy such position and performed the duties thereof, would not obligate the city to pay him any salary in excess of the specific amount then appropriated as a yearly salary for such position.

Gathemann v. City of Chicago, 263 Ill. 292.

We are, therefore, of the opinion that the city is not liable for said claim of J. Norman Jensen for one hundred twenty-one dollars and thirty-three cents (\$121.33) as salary withheld during period from June 29 to December 31, 1917, inclusive.

Respectfully submitted,

H. C. FOSTER,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Presence of Police Officers in Polling Places.

March 28, 1919.

COL. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

Replying to your request for an opinion as to the right of police officers to be present after the closing of the polls on election day and while the judges and clerks are counting the votes, and your further request as to what power or authority, if any, the Board of Election Commissioners of the

City of Chicago or the election officials of any precinct have to give orders to police officers, or to utilize the services of police officers for the transmission of the results of the election in the respective precincts, we beg leave to advise you that Section 235 of Chapter 46, Hurd's Revised Statutes, 1915-1916, page 1164, provides that:

“It shall be the duty of the judges of election to admit one or more officers of the law to be present in such room at the time of such canvass.”

The law provides that the canvass shall commence immediately upon the closing of the polls in the several precincts, and that such canvass shall not be adjourned or postponed until after it shall have been completed, nor until after the several statements required to be made by the judges and clerks shall have been made out and signed by them.

Section 239 of Chapter 46, page 1165 of Hurd's Revised Statutes provides as follows:

“Each batch of ten ballots counted by the judges of election shall, as soon as counted, read and tallied, be strung upon a strong string, thread or twine in the order in which they have been read; and each batch shall thus be disposed of before the commencement of the count as to the next batch.”

In addition to the presence of police officers, watchers and challengers with proper credentials are also permitted to be present during the canvass of the vote by the judges of election.

In canvassing the vote the law requires that immediately upon the closing of the polls the judges of election shall first count the whole number of ballots in the box in order to ascertain if the number of ballots in the box corresponds with the number of names entered on the poll lists, and that the judges shall then separate the ballots into separate groups, each group having in it the ballots which contain the same names together, so that the several kinds shall be in separate piles or separate files. When these ballots are counted the judges shall then canvass the other kinds of ballots which do not correspond, those containing names partly from one kind of ballot and those from another, being those usually called “split

ballots," and those from which the name of the person proper to be voted for on such ticket has been omitted or erased, usually called "scratched tickets." The law provides that these ballots shall be canvassed separately by one of the judges sitting between the two other judges, which judge shall call each name to the poll clerks and the office for which it is designated, the other judges looking at the ballot at the same time and the poll clerks making tally of the same.

As a matter of law, the canvass is not completed until all the ballots have been counted and the result entered by the election officials of the precinct in the official tally sheets. Under the law, it is the duty of the judges of election to admit one or more officers of the law to be present in the room at the time of such canvass, and the officer has the right, and it is his duty, to remain there until the entire canvass is completed and the result of the canvass entered of record on the tally sheet, and the ballots strung in accordance with Section 239 above quoted, and until the tally sheets are sealed by the judges of election.

Section 236 of Chapter 46, Hurd's Revised Statutes, 1915-1916, page 1164, regulating the holding of elections, provides as follows:

"Said judges of election shall have authority and it shall be their duty to keep the peace, and to cause any person to be arrested for any breach of the peace or for any breach of election laws, or any interference with the progress of registration, revision, election or of the canvass of the ballots; and it shall be the duty of all officers of the law present to obey the order of such judges of election, or either of them, and an officer making an arrest, by direction of any judge, shall be protected in making such arrest the same as if a warrant had been issued to him to make such arrest."

It will be observed from the foregoing section that, during the entire period of time during which the judges of election are officially engaged in conducting an election, registration, revision, or of the canvass of the ballots, they have a right, and it is their duty to require police officers to arrest any person obstructing their work or in any manner violating the law, and it is quite clear to us that the law contemplates

that police officers will be on hand during the entire time that an election, registration, revision or canvass of the ballots is being conducted for the purpose of aiding the judges of election in preserving law and order.

Police officers are not mere messengers for election officials, and neither the judges of election nor the Board of Election Commissioners have any power or authority to require police officers to perform work of any character except such work as may be necessary for the officers to perform to preserve law and order in and about the respective polling places. When the polls close and the canvass of the vote is completed, and the official documents and records have been sealed by the judges and clerks, and the election board has adjourned, their power and authority to direct police officers cease.

While it has been customary in the past for police officers to act as agents in the transmission of the result of the vote in their respective precincts, this has only been done in compliance with the orders of the general superintendent of police. If you desire the police officers to transmit the result of the canvass of the votes in the various precincts throughout the city on election day, April 1, 1919, you may do so by issuing the proper order to police officers.

Police officers, unless an order is issued by you to that effect, do not have to comply with a request to act as agents or messengers for the transmission of the results of the canvass of the ballots cast on election day, and no election official of the City of Chicago has any power or authority to require police officers to do so.

Under the law you have a right to issue an order and direct police officers to remain in the polling places during the entire time that the ballots are being canvassed and until the result of the canvass is entered by the election officials of the precinct on the official tally sheets, and until the said tally sheets are sealed ready to be removed from the polling place to the election commissioners' office.

We also beg to advise you that under the law you have the power and authority to direct the police officers to transmit the result^t of the canvass of the ballots in their respective

precincts in such manner as you may deem proper or advisable.

The law does not impose any duty on you to require police officers to transmit the result of the canvass of the ballots, but if you desire police officers to do so, you as general superintendent, have power and authority to so direct them and you are the sole judge as to what is the best way to handle the distribution of the result of the canvass of the vote.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Renewal of Plumber's License.

April 11, 1919.

BOARD OF EXAMINERS OF PLUMBERS, City of Chicago.

Gentlemen:

We are in receipt of your communication of recent date, requesting us for an opinion in regard to the renewals that are due on the certificate issued to Mr. Edward S. Burns, which expired on the 31st day of December, 1914.

From your communication it appears that Mr. Burns engaged in the business of master plumber and was licensed as such for the year 1914, his license having expired on the last day of said year. It appears that during the time intervening, namely, from December 31, 1914, to the present time, Mr. Burns was not engaged in the business of master plumber, but he desires to again engage in said business now, and if he desires to do so he must first secure a master plumber's license.

Under the law, it is the duty of the board to examine applicants as to their practical knowledge of plumbing, house drainage and plumbing ventilation, and if satisfied with the competency of such applicants to issue a certificate authorizing them to engage in or work at the business of plumbing

whether as master plumber or employing plumber or as journeyman plumber.

The fee for a certificate for a master plumber or employing plumber shall be \$50. The law also provides that the said certificate shall apply and have force throughout the state for a period of one year from the date of issuance and may be renewed upon its expiration by payment in advance of an annual renewal fee of \$10.

The certificate of Burns expired on the 31st day of December, 1914, and five years have elapsed during which time he has failed to apply for a renewal. Under a strict interpretation of the law we are inclined to the belief that he is not entitled to renewal of his certificate at this late period, but as your board has already applied a liberal interpretation to the language used in the statute and has permitted renewals of certificates when applications for renewals were made after the expiration of more than one year from the date of the expiration of certificates, we do not feel disposed to raise any objections, but rather to approve of your doing so. However, your board is not authorized under the law to grant the request of Burns to renew his certificate without first compelling him to pay the renewal fee due for each and every year intervening between the date of the expiration of his certificate and the present time.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Qualification of Newly Elected Officers.

April 12, 1919.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

We have been asked whether or not it will be necessary to call a special meeting of the City Council (it having adjourned to meet April 28, 1919) for the purpose of giving the

newly elected city officials the opportunity to qualify within the time fixed by law.

Section 12, Paragraph 1331 of Chapter 24, Jones & Addington's Illinois Annotated Statutes, page 919, provides as follows:

"It shall be the duty of the village or city clerk, within five days after the result of the election is declared or appointment made, to notify all persons elected or appointed to office of their election or appointment, and unless such persons shall respectively qualify in ten days after such notice, the office shall become vacant."

The above section applies to all city officials elected to office on April 1, 1919, namely, the mayor, the city treasurer, city clerk and members of the City Council.

Section 4, Paragraph 1347, Chapter 24, Jones & Addington's Illinois Annotated Statutes, page 973, provides that city officials shall qualify by taking an oath or affirmation, subscribing the same and filing it in the office of the clerk. It further provides that:

"all such officers except aldermen and trustees, shall, before entering upon the duties of their respective offices, execute a bond with security, to be approved by the City Council or board of trustees, payable to the city or village, in such penal sum as may, by resolution or ordinance, be directed, conditioned for the faithful performance of the duties of the office and the payment of all moneys received by such officer, according to law and the ordinances of said city or village; *provided, however*, that in no case shall the mayor's bond be fixed at a less sum than three thousand dollars (\$3,000); nor shall the treasurer's bond be fixed at a less sum than the amount of the estimated tax and special assessments for the current year—which bonds shall be filed with the clerk (except the bond of the clerk which shall be filed with the treasurer.)"

It will thus be seen that members-elect of the City Council qualify by taking, subscribing, and filing the oath provided for by the statute within ten days of the receipt of the notice sent out by the city clerk. While it has been the custom of the city clerk to administer the oath to the newly elected mem-

bers of the City Council at a regular meeting thereof, the law does not require them to wait until such meeting before taking and filing the oath. They may do so as soon as notified of their election and thus become fully qualified.

The mayor, city clerk, and city treasurer are also required by law to take, subscribe, and file oaths of office as provided by statute, and in addition thereto to execute bonds with good and sufficient security to be approved by the City Council.

In our judgment, in order to meet the requirements of the statute, the bonds of the mayor, city clerk and city treasurer, should be submitted to the City Council for approval within ten days of the receipt of the notice of election sent out by the city clerk.

The official proclamation of the result of the April 1 election was made on the 7th day of April, 1919, and we are advised that the city clerk sent out notices April 11th and 12th—within the five day period fixed by law for the sending out of such notices. It is obvious that if the next meeting of the Council is not held until April 28, 1919, the mayor, clerk and treasurer cannot comply with the law which requires them to qualify within ten days after the receipt of the notice sent out by the city clerk.

We are, therefore, of the opinion that a special meeting of the City Council should be called for a date not later than April 21, 1919, for the purpose of affording the mayor, city clerk and city treasurer an opportunity to present their bonds to said City Council for its approval as required by law.

Yours very truly,

FRANK S. RIGHEIMER,

First Assistant Corporation Counsel.

Approved:

S. A. ETTELSON,

Corporation Counsel.

Vacation of Plats.

April 14, 1919.

HON. ROBERT J. MULCAHY, Chairman, Sub-Committee on
Streets and Alleys.

Dear Sir:

We have your communication of February 13, 1919, with reference to an order introduced by Alderman Fisher at the council meeting held February 3, 1919, approving an instrument executed by the owners of the premises described therein, vacating certain alleys and authorizing the superintendent of maps to endorse such approval upon such instrument with the plat attached thereto. You ask the following questions:

First: Is the plat of the subdivision a statutory plat?

Second: Are the alleys sought to be vacated public highways laid out according to law?

With reference to the first question—we have examined the plat accompanying the vacation instrument and also the plat and records by which said subdivision was dedicated, and we find that the same is executed in accordance with Section 1 of Chapter 109 entitled "Plats," Hurd's Revised Statutes of Illinois, 1915-16, and therefore is a statutory plat.

With reference to your second question—it was held in *Heppes v. City of Chicago*, 260 Ill. 506, that the proviso to Section 7 of the Plat Acts, which prohibits the vacation of part of a plat if it shall close or obstruct "any public highway laid out according to law," has reference to highways laid out by highway authorities under the Roads and Bridges Act, and does not refer to a street or alley created by dedication under a plat.

Yours truly,

BENTON F. KLEEMAN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Dry Cleaning Establishment.

April 15, 1919.

BUREAU OF FIRE PREVENTION AND PUBLIC SAFETY, Fire Department of the City of Chicago.

Gentlemen:

Replying to your communication of February 3, 1919, in which you request us to advise you as to whether or not the provisions of the ordinance licensing and regulating dry cleaning establishments, passed June 25, 1917, applies to an application now filed with your department by a new party to conduct a dry cleaning establishment in premises that were formerly used for such purposes but which have been abandoned and have remained vacant for some time, we beg leave to advise you that Section 164 of the ordinance regulating dry cleaning establishments, passed June 25, 1917, and appearing on page 789 of the Journal of the Proceedings of the City Council of said date, provides, in part, as follows:

“Every such building shall be detached and at least fifty (50) feet from any other building or structure or to a line of adjoining property which may be built upon; provided, however, that the use of any building in which a dry cleaning business was carried on prior to the passage of said ordinance on July 22, 1912, may be continued where such building is separated from all other buildings by a fire wall, with no openings into any adjoining building; and further provided, that any building previously used for dry cleaning but not so occupied or used for such purpose for a period of three (3) consecutive months immediately prior to the passage of this amendatory ordinance, shall not again be used for the business of dry cleaning unless all requirements governing new buildings or dry cleaning plants have been complied with.”

It is our opinion that it was the intention of the City Council to limit the provisions of the above ordinance to premises that were continually used by the same person as a dry cleaning establishment. We believe that where new parties apply for a license to conduct a dry cleaning establish-

ment that they must be required to comply with all the terms and provisions of the ordinance now in effect.

We, therefore, beg leave to advise you that it is our opinion that the provisions of the ordinance regulating dry cleaning establishments as amended June 25, 1917, apply to all applications filed with your department by new applicants.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Validity of Bond Issues for General Corporate Purposes.

April 21, 1919.

HON. EUGENE R. PIKE, City Comptroller.

Dear Sir:

A copy of the letter addressed to you from Charles B. Wood, of the law firm of Wood & Oakley, under date of April 15, 1919, was turned over to the writer with the request that you be advised whether you should go ahead with the printing of the bonds mentioned therein, in view of the statements made by Mr. Wood.

Mr. Wood's letter is not directed against the validity of the bonds in the slightest degree. He calls attention to the fact that under our present revenue law it will not be possible after the year 1921 to put the levies for bonded indebtedness outside of the minimum provided for the city and states that with the huge indebtedness of the city at the present time it will be impossible to approve the additional bonds unless the law is amended so as to provide for a larger revenue or the continued exclusion of bond levies from the minimum. This of course, does not affect the validity of the bonds, and we see no reason why you should not proceed with printing. Incidentally we may state that the question of removing this five-year limitation has been agitated and we have not found any member of the legislature who has expressed himself as unwilling to remove that limitation. We feel certain that when

the Juul law is amended at this session the five-year limitation will be removed, and then there can be no objection on account of there being insufficient funds to take care of the city's indebtedness in the future.

As to the second point in Mr. Wood's letter, he states with reference to the judgment funding bonds that the amount that can be issued is limited by the ordinance to judgments that were entered up to a certain date, and he suggests that, inasmuch as this limitation has been placed on the issue, it would be well for the City Council to go on record and indicate exactly what that limit is. We request, therefore, a list of all judgments which are to be paid out of these bonds, together with interest charges up to July 1, 1919, the date at which the bonds are to be issued. When we receive this list from you we will prepare an ordinance which can be presented to the City Council expressly defining the amount of bonds that may be issued under the power already secured. This will remove all further question with reference to the exact amount of bonds that may be issued for judgment funding purposes.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

FRANK S. RIGHEIMER,

Acting Corporation Counsel.

Games of Skill in Parks.

May 7, 1919.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt from you of applications for licenses to be issued permitting games of skill in a park located at the southeast corner of 33rd street and Wabash avenue, in the City of Chicago. The applications request the licensing of a cat rack, a baby rack, a huckle-de-buck game, a novelty hoopla game and baseball game,

In reply we beg to advise you that for the purpose of licensing, amusements have been classified into twenty-one classes by the City Council and are to be found in Section 106 of the Chicago Code of 1911, and the authority conferred on you to license the park in question and the concessions and games of skill are as follows:

“7th Class. All grounds, gardens or other enclosures of the kind commonly known and described as ‘amusement parks’ wherein shows of different classes are offered or presented by one or more concessionaires.

“10th Class. All baseball, football, track and field games or other athletic exhibitions of like character.

“17th Class. All entertainments consisting of games of skill and strength testing devices, including lifting, blowing, striking or pulling machines, and all small swings operated by human power.

“18th Class. All entertainments operated by motive power other than animal power, including devices, apparatus, attractions and amusements for the transportation of persons.

“21st Class. All entertainments, exhibitions, performances, or amusements not included in any of the foregoing classes.”

In the performance of the games for which licenses have been requested, skill and accuracy on the part of the participants is required, and there does not appear to be any feature of gambling involved. Games of like character have been and are now licensed by the city in all of the larger amusement parks in Chicago, and while the park in question is smaller than other amusement parks, it has been licensed by the city, and the owner of said park is entitled to the same right and privileges as owners of other parks throughout the City of Chicago.

The applications have been investigated by the Police Department and the general superintendent of police has recommended that the licenses applied for issue, and it is apparent to us that all of the requirements of law have been complied with by the applicant.

It is therefore our opinion after carefully considering the applications and the law licensing amusements that the

applicant is entitled under the law to have the license applied for granted.

Very truly yours,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Contractor's Claim on Madison Street Bridge.

May 9, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of April 14th, in re proposal of Paschen Bros., in connection with bid on the sub-structure of a new bridge and including a temporary bridge at Addison street.

It appears from your communication and the attached letter from Paschen Bros., and the Bureau of Engineering, that in bidding under Item H of the proposal, an error was made in the bid. That immediately upon learning of the error and before any awards were made, Paschen Bros. communicated with you advising you of the apparent error and correcting same.

You wish to be advised whether or not you have authority to consider the error and accept the bid as corrected. A case quite similar to this was considered by the court in the case of *Beaver v. Trustees*, 19 Ohio State 97, in which it was said:

“We do not intend to be understood as holding that a mistake in a proposal may not be rectified in case of mistake of fact and the requisite data for its rectification are both apparent upon the face of the proposal, as if, for instance, Beaver & Butt had expressly named in their proposal the items of hardware for doors and windows, with prices annexed, or if a mistake in their arithmetic was detected. In all such cases we think the mistake may and ought to be rectified. It would be but just to

the bidder and would in no way contravene the provisions of the law."

We believe that under the authority of this case, which was cited with approval in *City of Chicago v. Mohr*, 216 Ill. 320, at page 329, that you would be authorized to allow the correction of manifest error of fact or arithmetic appearing on the face of a bid and to accept the bid when corrected.

However, we wish to emphasize the proposition that each case must be decided upon the particular facts involved therein and that no rule can be laid down which will be applicable to all cases.

Yours very truly,
 GEORGE A. CURRAN,
Assistant Corporation Counsel.

Approved:
 SAMUEL A. ETTELSON,
Corporation Counsel.

Medical Inspection in Schools.

May 14, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

Replying to your favor of recent date, forwarding to us a copy of a communication sent to you by Dr. Robertson, Commissioner of Health, calling your attention to a motion made by Alderman McCormick at the regular meeting of the City Council held February 21, 1919. The motion appears on page 1682 and is as follows:

"Ald. A. A. McCormick moved that it be the sense of the City Council that the expense of medical and dental inspection and similar activities in the public schools be not maintained out of the corporate revenues of the City of Chicago after April 30, 1919."

The above motion prevailed and Alderman McCormick moved that the city clerk be directed to notify the Board of Education of the action of the City Council in respect to school health officers, etc.

In your communication you requested us to advise you whether it will be necessary for the Department of Health to discontinue the payment of salaries for medical and dental inspection in the public schools after April 30, 1919, unless the Board of Education provides funds for such purpose.

In reply, we beg to advise you that on April 28, 1919, the City Council passed an ordinance directing the city comptroller and city treasurer to pay to the several officers and employes of the City of Chicago as salaries and compensation respectively, including ward activities, for the month of May, 1919, the amount per month authorized to be paid for the fiscal year ending December 31, 1918, subject, however, to such changes as may be made in such salaries and compensation by the general appropriation ordinance for the fiscal year 1919.

In view of the passage of this ordinance by the City Council without exempting from its provisions the medical and dental inspectors in the public schools, it is our opinion that the commissioner of health should not discontinue the services of such inspectors during the month of May.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of Words "Public Place."

Chicago, May 14, 1919.

HON. WM. G. KEITH, Commissioner of Gas and Electricity.
Dear Sir:

You communication of May 5th relative to the interpretation of certain words occurring in Section 2500 of The Chicago Code of 1911 has been referred to me for attention.

You desire to know whether the words "public place" in Section 2500 of The Chicago Code of 1911 applies to the Chicago river and its branches and whether it is a violation of the

above mentioned section to install and maintain a submarine cable across the river without first having obtained the proper franchise from the City Council.

Section 2500 of The Chicago Code of 1911 as amended July 21, 1913 (Journal of the Council Proceedings of said date, page 1595), provides as follows:

“2500. PERMIT TO ERECT REQUIRED.) No person or corporation shall erect, construct, maintain, use, alter or repair any pole, line or wire, underground conductors or electric conductors of any description whatever on any street, sidewalk, alley, avenue or *public place* within the city, without first having obtained a permit therefor, under a valid and existing ordinance, from the commissioner of public works, which permit shall be countersigned by the city electrician, under a penalty of one hundred dollars for each and every offense; and it shall be deemed a separate and distinct offense for each and every day such pole, line or wire, or electric conductor, shall be maintained or used after the first conviction.”

A public place has been defined as a place where the public has a right to go and be, and again the term “public” as applied to place, is not an absolute, but a relative term, and is used in contra-distinction to the term “private.” *State v. Sowers*, 52 Ind. 312; *State v. Waggoner*, *id.* 481; *Cahoon v. Coe*, 57 N. H. 595.

The term is broad and may include all the places not exclusively private, over which the municipality exercises its jurisdiction as an agent of the public.

By statute the city is given jurisdiction over all waters within and bordering upon the city (Cities and Villages Act, Chapter 24, Hurd’s Revised Statutes, 1917, 1918, Section 71) and has ample power and authority to make reasonable regulations concerning the use of the river. (*Harmon v. City*, 110 Ill., page 400.)

It has further been held by our Supreme Court that the water and bed of the Chicago river are the property of the riparian owners, subject, however, to an easement in the public for the purposes of navigation. (*City of Chicago v. McGinn*, 51 Ill., pp. 266-272; *City of Chicago v. Van Igen*, 152 Ill. 624-632).

From the foregoing it is apparent that the Chicago river is a public way, over which the City of Chicago has control, and upon which the public has the right of travel and navigation. It is also evident from the foregoing that the words "public place" are broad enough to include the river and its several branches, and that it would be a violation of the section of the ordinance above referred to, for any person or corporation to install and maintain a submarine cable across the river without first having obtained a valid ordinance from the City Council for such purpose.

Very truly yours,

DANIEL A. ROBERTS,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Salary of Reinstated Employee.

May 20, 1919.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your communication relative to the claim of Jacob L. Jacobs for \$11,833.33 for salary as expert on sytem and organization has been referred to me for reply.

On May 8, 1915, Jacobs was suspended from his position, and on June 8, 1915, was laid off and his name restored to the eligible register in the office of the Civil Service Commission, for certification.

Thereafter on August 16, 1915, he filed a petition in the Circuit Court for a writ of mandamus, seeking to compel his reinstatement to said position and for back salary at the rate of \$291.66 2-3 per month from May 8th, 1915 (the date of his suspension) up to the time at which he shall be reinstated in said position. Such proceedings were had in said cause as resulted in a judgment awarding a writ of mandamus as prayed for, and upon appeal to the Appellate and Supreme Courts said judgment was affirmed.

People v. Coffin et al., 282 Ill. 599.

With reference to the position in question, our Supreme Court held that the appropriation ordinances passed by the City Council amounted to direct authority to the Civil Service Commission to classify, examine, certify and have employed, by the Civil Service Commission, an incumbent for every office or position therein appropriated for.

People v. Coffin et al., 282 Ill. 599-607.

People v. McCullough, 254 Ill. 9.

Fergus v. Russell, 270 Ill. 304.

The annual appropriation ordinance for the year 1915 (Council Proceedings, p. 2900) contains the following:

“CIVIL SERVICE COMMISSION EFFICIENCY DIVISION.

Expert on System and Organization\$3,500.00

Expert on System and Organization 3,000.00

26—A-1.”

Under the ruling of the Supreme Court this was direct authority from the City Council to the Civil Service Commission to classify said positions into the classified service, and to examine, certify and appoint an incumbent for each of said positions in the Civil Service Department.

In the year 1916 no appropriation was made for said positions in the Civil Service Department, but an appropriation was made for positions of the same name and presumably of the same character in the Committee on Finance. Said appropriation ordinance appears in the Council Proceedings for 1916, on page 3533 and contains the following:

“COMMITTEE ON FINANCE

Expert on System and Organization\$3,500.00

Expert on System and Organization 3,000.00

5—A-1.”

In 1917 the appropriation appears in the Council Proceedings (page 3073) as follows:

“COMMITTEE ON FINANCE

Expert on System and Organization\$3,000.00

5—A-1,”

and a similar appropriation was made for the year 1918 (Council Proceedings, p. 2110).

From the foregoing, it appears that the position from which Jacobs was removed in the year 1915, i. e. “Expert on

System and Organization in the Efficiency Division of the Civil Service Commission," was abolished by the failure of the City Council to make an appropriation for said position in the Civil Service Department for the year 1916.

It further appears that the action of the City Council in appropriating for a position of the same name and amount of salary in the "Committee on Finance" had the legal effect of authorizing the classification of said position by the Civil Service Commission and the appointment and employment by the Committee on Finance of an incumbent for such position for the year 1916 in accordance with the provisions of the Civil Service Act.

In the years 1916 and 1917, as we have already seen, an appropriation was made for one position only and that at the rate of \$3,000 per annum.

The final judgment in this case awards a writ of mandamus to compel the Civil Service Commissioners to restore Jacobs to the said position of "Expert on System and Organization, salary \$291.66 2-3 per month and to permit him to discharge the duties thereof." The position from which Jacobs was removed was a position in the Civil Service Department, and the failure of the City Council to make an appropriation therefor has automatically abolished said position in that department and has placed the question of restoration of Jacobs to said position beyond the power of the Civil Service Commissioners, by reason of the provisions of Section 10 of the Civil Service Act, which provides in part as follows:

"The head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs * * *."

The position from which Jacobs was removed being no longer in existence in the Civil Service Department of the city, the Civil Service Commissioners are without power to restore him to any position of the same class and grade to which he belongs in any other department of the municipal government in the absence of an appropriation for such position and no-

tice from the head of such department of a vacancy in such position.

In the Supreme Court of Illinois, we called the attention of the court to the fact that on January 10, 1916, the date judgment was rendered in the Circuit Court, no showing was made by petitioner of the existence of the said position for the year 1916, and the Supreme Court in its opinion rendered on a rehearing of said cause, 282 Ill. 599, on page 611, said :

“In a petition for rehearing in this case our attention has been called to the fact that the judgment of the circuit court was rendered January 10, 1916, and provided that the relator be paid his salary up to the date of his reinstatement; also that the appropriation ordinances referred to in the opinion by which the position held by the relator was created expired at the end of the respective fiscal years in which they were passed, and the last ordinance pleaded, appropriating compensation for the relator, was for the year 1915, which appropriation expired December 31, 1915. There was an unexpended balance of the amount appropriated by said ordinance to pay the relator for that year, as alleged in the petition and stated in the foregoing opinion, of \$2,333.33. Whether relator, upon being reinstated, should have been adjudged compensation from the city for more than the above amount, or for any period beyond the year ending December 31, 1915, depends upon whether similar ordinances have been passed appropriating compensation for the years subsequent to 1915 to the date of his reinstatement as ordered by the court. The order and judgment of the circuit court rendered on the above mentioned date was ‘that a peremptory writ of *mandamus* issue forthwith against Percival B. Coffin, Charles E. Frazier and Joseph P. Geary, as civil service commissioners of the City of Chicago, E. H. Davenport, Charles H. Sergel, as city treasurer of the City of Chicago, and Eugene R. Pike, as city comptroller of the City of Chicago, commanding the said Percival B. Coffin, Charles E. Frazier and Joseph P. Geary, as civil service commissioners of the City of Chicago, forthwith to restore your petitioner to the said position of expert on system and organization, salary \$291.66 $\frac{2}{3}$ per month, and to permit him to discharge the duties thereof, and commanding the said Charles H. Sergel, as city treasurer of the City of Chicago, and Eugene R. Pike, as city comptroller of the City of Chicago, and the City of Chicago, to pay or cause to be

paid to your petitioner out of the funds of the City of Chicago, appropriated for that purpose a sum of money equal to the amount due him as salary for the performance of the duties of said office or position of expert on system and organization, salary \$291.66 2-3 per month, at the rate of \$291.66 2-3 per month from the 8th day of May, 1915, up to the time at which he shall be reinstated in said position.'

"While the last part of the order above set out directs that the relator be paid by the city his salary from the 8th day of May, 1915, 'up to the time at which he shall be reinstated in said position,' it is further provided in the order that the city shall 'pay or cause to be paid to your petitioner out of the funds of the City of Chicago appropriated for that purpose,' etc. Under a fair construction of the order and judgment of the circuit court the amount which the city is to pay is only to be paid out of the money appropriated for that purpose. In this case the position of relator having been created by an appropriation ordinance, the amount paid can only be whatever has been appropriated by such ordinance. The point is not very material, as the main question involved was the right of the relator to be restored to the position in question, and the order restoring him carried with it the right to the salary or compensation attached to such position as far as an appropriation had been made therefor. There is some conflict in its terms, but reading the entire order and judgment in question it only provides that the relator shall receive pay, by reason of being restored to his position, out of whatever funds have been appropriated by the city, for the purpose of paying his salary, and accordingly he would be only entitled to pay up to the time for which an appropriation has been made by any ordinance for his compensation. If the last ordinance appropriating pay was the ordinance of 1915 and there was no ordinance making an appropriation for that position after that, then the order of the court entered January 10, 1916, directing that he be paid up to the time of reinstatement, may be disregarded, as it would only apply if there had been a subsequent appropriation."

Figures submitted to us by the city comptroller show that out of the appropriation of \$3,500 for the year 1915 there was expended the sum of \$2,818.73 by payments to J.

L. Jacobs and E. H. Davenport, leaving a balance unexpended amounting to \$681.27; in the year 1916 the amount expended from the \$3,500 appropriated was \$656.24, leaving a balance of \$2,843.76; in the years 1917 and 1918 no appropriation was made for the \$3,500 position in question in any department of the municipal government.

From the foregoing, it appears that a total sum of \$3,525.03 remains unexpended from the appropriation for said position for the years 1915 and 1916, to which sum Jacobs is entitled under the ruling of the Supreme Court.

The foregoing appropriation ordinances having expired by their own terms and by operation of law at midnight of the last day of each of the respective years, it is beyond the power of the city comptroller to draw a voucher or warrant against a fund which no longer exists and it will be necessary for Jacobs to reduce his claim to a money judgment in court and for the City Council to appropriate a sufficient sum of money to pay such judgment, or the City Council may at its discretion allow the claim of \$3,525.03 without having it reduced to judgment, this being the amount shown by the comptroller's records remaining unexpended from the appropriations in question for the years 1915 and 1916.

The question of the reinstatement of Jacobs rests entirely with the City Council. If, as hereinbefore stated, his position is re-created or authorized in the Civil Service Department or elsewhere in the municipal government of the City of Chicago, the head of such department would then give notice of a vacancy in such position and the name and address of Jacobs, which still remains on the eligible register, would be certified by the Civil Service Commission to the head of such department for appointment.

We are of the opinion that the claim for compensation in this matter should be allowed for the sum of \$3,525.03 either before or after being reduced to judgment upon the understanding that Jacobs will execute a release as to all claims against the City of Chicago in excess of that amount, we being

of the opinion that there is no liability on the part of the City of Chicago in excess of the foregoing amount.

Very truly yours,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Exemption of Hospital from Water Rates.

May 21, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your communication addressed to the corporation counsel requesting an opinion if certain buildings used by the United States Army General Hospital No. 32, for the United States Soldiers, should be exempt from the payment of water rates under the provisions of Section 2755 of The Chicago Code of 1911, has been referred to the undersigned.

The portion of the ordinance in question which is to be interpreted, reads as follows:

“§2755. EXEMPTIONS—CHARITABLE, MUNICIPAL, RELIGIOUS AND EDUCATIONAL, INSTITUTIONS AND ARMORIES.) The commissioner of public works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the city as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution, or which have been heretofore or may hereafter be levied and assessed against any armory of the National Guard.”

A strict interpretation of the above ordinance would indicate that it was not the intention of the members of the City Council to class all hospitals as charitable institutions, and therefore entitled to be placed upon the free water list,

but we are of the opinion that so long as said buildings are occupied by the United States Army hospital and used exclusively for United States soldiers, you will be justified in remitting the charges for water supplied to said buildings.

Yours very truly,

CHARLES E. PEACE,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

License for Bathing Beach.

June 14, 1919.

HON. CHARLES J. FORSBERG, City Collector.

Dear Sir:

We are in receipt of your communication of June 12, forwarding to us the application of Phillip Cleys and John Watte for a license to conduct a bathing beach at 75th street and Lake Park avenue, in which communication you inform us that the said application has been approved by the Police and Health Departments.

In your communication you advise us that Alderman Ross A. Woodhull has filed a protest on behalf of the residents and owners of property adjacent to and in the vicinity of the proposed beach, against the issuance of the license, and requesting us to inform you as to whether or not you have any power or authority under the law to comply with the request of Alderman Woodhull to refuse the applicants a license for a bathing beach.

In reply, we beg to advise you that Section 161 of The Chicago Code of 1911, as amended, provides that any person, firm or corporation desiring to carry on, engage in or conduct any boating, fishing or bathing beach, shall first make application in writing to the mayor of the City of Chicago for a license so to do, stating therein the name and residence of the applicant, the place and character of the proposed beach, and the size, number and character of the boats (life rafts,

life buoys and apparatus for the resuscitation of those apparently drowned), with which said beach is equipped; the said application to be accompanied by a certificate of the commissioner of health approving the location of the proposed beach, stating whether the water at such location is in a sanitary condition, and whether the size, number and character of the boats, life rafts, life buoys and apparatus for the resuscitation of those apparently drowned with which said beach is equipped are of such number, character and in such condition of repair as to secure a reasonable provision for the protection of the safety of those patronizing such boating, fishing or bathing beach.

The ordinance further provides that if from such certificate it appears that the commissioner of health approves the location of said beach, that the water is in a sanitary condition, that the size, number and character of the boats, life rafts, life buoys and apparatus for the resuscitation of those apparently drowned with which such beach is equipped are of such number, character and in such condition of repair as to secure a reasonable provision for the protection of the safety of those patronizing such boating, fishing or bathing beach, and if the mayor shall be satisfied that the applicant is of good moral character, he shall grant, and cause to be issued to such applicant, a license to establish and conduct such beach at the location set forth in said application, upon payment by the applicant of the license fee hereinafter specified, provided, however, that any person, firm or corporation desiring hereafter to conduct or carry on a bathing, fishing or boating beach at any place in the City of Chicago where two-thirds or more of the buildings situated within 1,000 feet from the nearest point in any boundary line of such place are used for residence purposes, and where a bathing, fishing or boating beach has not been actually carried on under a license issued by the City of Chicago for the year ending April 30, 1909, or a portion thereof, shall, before a license is issued for the conduct of such beach at such place, present to the mayor with the application and certificate required, the written consent to the location of such beach of a majority of the property own-

ers according to frontage on both sides of all the streets around the block in which such beach is to be conducted, and shall also present the written consent to the location of such beach of a majority of the *bona fide* householders living within 1,000 feet from the nearest point of any boundary line of such place where it is proposed to carry on such boating, fishing or bathing beach.

The application forwarded to us has been approved by the general superintendent of police and by the commissioner of health, and if the proposed beach is to be located within territory where frontage consents are not required under the ordinance, it is our opinion that the applicant is entitled to and should receive a license.

If the location is one where frontage consents are required, before granting of a license by you it is your duty to so inform the applicants and notify them to produce the same in order to obtain a license.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Amendment of Annual Appropriation Bill.

Chicago, July 7, 1919.

HON. SAMUEL A. ETTELSON, Corporation Counsel.

Dear Sir:

The question of the right to make amendments to the Annual Appropriation Bill of 1919 was referred to me, and I beg leave to submit the following concerning same:

Prior to December, 1915, the section of the Cities and Villages Act under which appropriations were made for all corporate purposes was as follows:

“The city council of cities, and board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate

such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a petition signed by them or at a general or special election duly called therefor.

Article VII, Sec. 2, Cities and Villages Act.

Although the language quoted above hardly admits of doubt, nevertheless a practice had grown up of making appropriations from miscellaneous receipts at a later date under the theory that the law limited appropriations only in case the money was to be raised by direct annual taxes. This practice was held to be illegal in the case of *City of Chicago v. Sergel*, 269 Ill. 619.

As a result of the Sergel decision the section quoted above was amended so that it was possible to make appropriations from miscellaneous receipts up to July first of each year. The section as amended, with the amended portions italicized, follows:

“§2. The city council of cities, and board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance, to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. *Such ordinance in cities and villages having a population of one hundred thousand or more, may be amended at the next regular meeting of the city council or board of trustees, as the case may be occurring not less than five days after the passage thereof in like manner as other ordinances.* No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by a peti-

tion signed by them, or at a general or special election duly called therefor: *Provided, however, that in cities and villages having a population of one hundred thousand or more, the city council or board of trustees, as the case may be, may, at any time within the first half of the fiscal year, by a two-thirds vote of all the members of such body, pass additional or supplemental appropriation ordinances making appropriations from any receipts derived from any other source than the annual taxes levied in accordance with the provisions of Section 1 of Article, VIII of this act.*"

Questions had arisen from time to time as to what was the time of passage of the appropriation bill when not signed before April first, as to the right to amend this bill at any time, and more particularly as to the right to amend after April first when the ordinance was passed so late that the approval of the mayor had not been given before that date.

The law was well settled on these points before the statute was amended.

In *Kline v. Mayor, etc. of Streator*, 78 Ill. App. 42, it was held that the City Council had the right to amend at any time up to April first, and that although the signature of the mayor was not attached until after the first of April the requirement that the bill be passed before that time was complied with if the Council had acted. This has been affirmed in subsequent cases. (See *People v. Florville*, 207 Ill. 79.)

In the case of *City of Chicago v. King*, 111 Ill. 63, it was held that in the case the mayor vetoed any items within the statutory time for a veto but after the first quarter had passed, the City Council still had control over the items vetoed by reconsidering such items, so that it could pass the items over the mayor's veto or pass an appropriation for a portion of the amount of such items, in either of which cases the action was held to be not a new appropriation but a reaffirmance of the former action that related back to the date of the passage of the ordinance.

The effect of the new provision relating to amendments was two-fold. It cut off amendments after the next regular meeting of the City Council following the meeting at which the appropriation was passed if five days intervened. On the

other hand, it did permit amendment at such meeting even if it was held after the first of April. There has been no decision of the Supreme Court passing on these questions since the statute was amended, but there seems little doubt about the meaning of the language used in the amendments.

This year it was found impracticable to pass the appropriation bill within the first quarter of the fiscal year. In order to overcome this difficulty the following addition was made to the statute above quoted :

“And, provided, further, that in the year 1919, in cities and villages having a population of one hundred thousand or more, the city council or board of trustees, as the case may be, may, at any time within the first half of the fiscal year, pass its annual appropriation bill, or it may, at any time within the first half of the fiscal year after the passage of the annual appropriation bill, pass additional or supplemental appropriation ordinances adding appropriations to the annual appropriation bill by making appropriations which may relate back to the commencement of the said fiscal year, thereby amending the said annual appropriation bill, and such city council or board of trustees, as the case may be, may, in the year 1919, at any time during the first half of the fiscal year, authorize the issuance of certificates of indebtedness to be redeemed by warrants issued in anticipation of the taxes levied for the year 1919 when the same can be lawfully issued, such certificates of indebtedness to be in all respects of equal binding force as such tax anticipation warrants except that the aggregate amount for which they may be issued shall not exceed one-fourth of the aggregate amount of the appropriations for the year 1919, and they shall be redeemable as aforesaid, but in case they are not so redeemed they shall constitute a lien against and be payable out of the proceeds of said tax levy.”

The addition thus made was an emergency measure which was intended to apply for this year only. It will be observed that there was provision made for passing the annual appropriation bill later than usual, although it had to be passed within the first half of the fiscal year, but there was no provision made for amending the bill after the expiration of the period within which it had to be passed. The provision con-

cerning amendment which was placed there in 1915 and which will permit an amendment at the next meeting does not apply to the meeting following the passage of the appropriation bill at a later date under this emergency amendment. On the contrary, the new provision expressly limits the passage of additional or supplemental appropriation ordinances which have the effect of amending the original appropriation bill to the first half of the fiscal year.

Such being the case, we must construe the law relating to amendments to an appropriation bill which can be passed within the first half of the fiscal year, where there is no express provision for amendment, to be the same as in the case of an appropriation bill which must be passed within the first quarter where there is no provision for amendment. In other words, the construction the Supreme Court placed upon the limitation in the act before it was amended in 1915 applies to the provision extending the time to the first of July.

On this point the Supreme Court said, in the King case:

“Although the city council is made to consist of the mayor and aldermen, the requirement that the city council shall, within the first quarter of the fiscal year, pass an ordinance to be termed the ‘annual appropriation bill,’ does not mean that there shall be passed a completed ordinance having the sanction of both city council and mayor, within that time. City council and mayor are distinguished from each other in this requirement. The council is given until the last moment of the period named to pass the appropriation bill, and then afterward is to come the action of the mayor upon it. The law expressly provides for the action of the mayor upon an ordinance after it shall have been passed by the city council, giving him at least five days’ additional time therefor, in requiring that all ordinances passed by the city council shall, before they take effect, be deposited in the office of the city clerk, for the mayor to approve or not approve, and that such as he shall not approve he shall return to the council with his objections thereto, in writing, at the next regular meeting of the council occurring not less than five days after the passage thereof. Upon the return of the ordinance by the mayor, it is made the duty of the council to reconsider the vote by which the same was passed. If upon such reconsideration after the expiration of the first quarter of the fiscal year, vetoed

items of an appropriation bill passed within such first quarter be passed by the council over the veto, the appropriations are to be taken, within the meaning of this provision in question, as having been passed within the first fiscal quarter. This was so expressly decided by this court in *Fairfield v. The People*, 94 Ill. 245. * * * It was considered, in the former case, that the subsequent action of the council after the first quarter of the fiscal year, amounted in law but to an adherence to appropriations previously made,—and for the same reason, we think, it must be regarded, here, that the subsequent action of the council on June 7, 1884, reducing the appropriation in amount and repassing it as reduced, amounted to an adherence, *pro tanto*, to the appropriation which had been made on May 31, 1884, and is to be considered, within the meaning of the statute in this respect, as having been made within the first quarter of the fiscal year. The whole includes a part. The passage of the appropriation in its entirety within the time limited, included within it the passage of any part of the appropriation—the reduced portion—within that time. There was here no change of appropriation in object or increase in amount. The appropriation was the same, except that it was reduced in amount. Such reduced appropriation is not, we think, to be regarded as the *further* appropriation which the law forbids to be made after the expiration of the first quarter of the fiscal year, the language being: ‘No further appropriations shall be made at any other time within such fiscal year, unless,’ etc. The requirement that the annual appropriation bill shall be passed within the first quarter of the fiscal year, we regard as to some extent in the interest of the tax-payer, and that the reduction of an appropriation is rather for the tax-payer’s benefit in its tendency to lessen the burden of taxation.”

The same question that now confronts us, which was in fact decided by the *King case*, was again raised in the case of *People ex rel. O’Connell v. C. B. & Q. R. R. Co.*, 266 Ill. 150. We quote liberally from this case, it being the latest expression of our Supreme Court on this point as follows:

“It will thus be seen that a very material increase was made in the appropriations for the items last enumerated.

“The statute prescribing the powers and duties of

the board of commissioners of Cook county, in so far as the same relates to its powers to pass appropriation bills and make levies of taxes, confers practically the same powers as those given the mayor and city council by the Cities and Villages Act to levy taxes. Under the Cities and Villages Act it has been held that the requirement that the appropriation ordinance shall be passed within the first quarter of the fiscal year is a provision in the interest of the tax-payers and that a compliance with that provision is a prerequisite to the passage of a tax levy ordinance and a failure to pass the appropriation ordinance until after the end of the first quarter of the fiscal year is a fatal omission, which renders the tax invalid. (*People v. McElroy*, 248 Ill. 574; *People v. Read*, 261 *id.* 502.) What was said in those cases applies to the appropriation bill of the board of commissioners of Cook county. It is true that when an appropriation bill or ordinance has been passed within the first quarter of the fiscal year and the veto of the president of the board or mayor is not received until after the first quarter of the fiscal year has ended, the board of county commissioners or the city council, as the case may be, has power to reconsider the vote by which the items vetoed were originally passed, and if the majority prescribed by the statute concur in passing such items the same shall take effect notwithstanding the veto and not withstanding the fact that final action was not had until after the end of the first quarter of the fiscal year. This is upon the theory that the reconsideration of the vote by which the items were originally passed relates back to the time of the passage of the original appropriation bill or ordinance. This was the holding of the court in *Fairfield v. People*, 94 Ill. 244, and *King v. City of Chicago*, 111 *id.* 63. In the latter case it was held that where the mayor of a city returns an appropriation ordinance that is vetoed as to one item thereof for the reason that it is too large, the same having been passed on the last day of the quarter of the fiscal year but returned at the next meeting of the council thereafter, and the city council then passes the same at a reduced sum over the veto, this will be regarded as an adherence to the appropriation as made in part, and the same will be legal as having been passed in proper time. The basis of this holding is that the right to pass the whole over the veto includes the power to pass the same in part, and that adhering in part to the item of appropriation is not a further appropriation. * * *

The fatal objection to the action of the Board of Commissioners in this particular is that it made no attempt to reconsider the vote by which these items were originally appropriated. The record of the board discloses clearly that its intent was to appropriate for other items in the place of those vetoed by the president. The resolutions making the appropriations of March 22 state that the same are made in place of the items and sums in the annual appropriation bill theretofore disapproved and vetoed. Among the items for which appropriations were made by the resolutions of March 22 appeared many that were nowhere mentioned in the original appropriation bill, and which therefore did not receive the consideration of the Board of County Commissioners at the time the original appropriation bill was passed or of the president of the board when he returned the same. In other instances appropriations for items which were contained in the original appropriation bill and which were disapproved and vetoed were materially increased. To make these appropriations, although for the same items, in a largely increased sum cannot be said to be an adherence to the vote by which the original appropriation bill, or any of the items thereof, was passed.

“The statute requiring the Board of Commissioners of Cook County to pass its appropriation bill within the first quarter of the fiscal year is mandatory and must be followed. As no attempt was made, after the receipt of the veto message of the president, to reconsider the vote by which the vetoed items had been originally passed, as the statute plainly requires, the veto of the president became absolute, and the board was without power to pass any further or additional appropriation bill after the end of the first quarter of the fiscal year.”

People ex rel. O'Connell v. C. B. & Q. R. R. Co., 266 Ill. 150-161.

Applying the law as set forth in the above cases to the situation now before us, the following conclusions must be drawn therefrom:

1. The City Council has now done all it can do on its own initiative on the Annual Appropriation Bill for 1919. It cannot even amend same if it undertakes to originate the amendment.

2. In case the mayor vetoes an item or items, the City Council may reconsider its former action as to those items

and may either pass them over the mayor's veto or reduce the appropriation, in which event its action will be held to relate back to the time of passage, but it cannot increase its appropriation because that will be considered a new appropriation.

3. In case of any correction in the language relating to any appropriation the City Council can only act upon the submission of a veto from the mayor so as to carry out the original intention of the Council and not so that the purpose of the appropriation affected is changed.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Power to Transfer Appropriations.

Chicago, July 8, 1919.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of even date herewith wherein you inquire concerning the rights of the City Council in the making of transfers from one appropriation to another within the department or separate agency of the municipal government.

Your letter calls for an interpretation of the following section of the statute:

“§ 2a. The city council of cities, and board of trustees in villages having a population of one hundred thousand or more, shall, at any time after the first half of each fiscal year, have power, by a two-thirds vote of all the members of such body, to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose.”

You also ask for answers to certain specific questions applying to the situation at present confronting you which we

will take up after discussing in a general way the section above quoted.

It is a cardinal rule of construction that every part of a statute must be construed with every other part of same so as to give effect to the whole and to each part thereof. Another rule of construction is to the effect that unless a later statute expressly repeals a former statute the two must be construed so to as keep both in force unless there is an irreconcilable conflict which amounts to a nullification of the former statute and a consequent repeal by implication.

Having in mind these two rules, we find that although the section above quoted permits some elasticity and an indirect method of partially overcoming the limitations of other sections of the same act, as you say, nevertheless there is still in force every provision that makes it obligatory for the City Council to pass its annual appropriation ordinance within the time fixed by statute, and which prohibits any appropriation thereafter except in the manner expressly provided by statute. The statute which declares that compensation of all officers shall be by salary as fixed in the annual appropriation bill and shall not be altered during the fiscal year must also be given its full effect.

We held, in an opinion submitted to the City Council on July 7, 1919, that the Appropriation Bill of 1919, which was passed by the City Council on June 30, 1919, could not be amended by an amendment originating with the City Council, but that it was only possible at that meeting to amend as a result of the vetoing of an item or items by the mayor in such a way that the amendments could not be regarded as new appropriations—in other words, that, on reconsideration of the vote by which the item was passed, the City Council could pass the original item over the veto, could pass an item for the same purpose for a smaller amount, or by failing to do either could let the mayor's veto wipe out the item. Since then, of course, even this limited power of amendment is gone, because the mayor has exhausted his veto power. Hence, the Appropriation Bill for the current year must stand as it now is.

The occasion for the passage of the section above quoted permitting transfers, as well as the purpose in view, may be surmised from the fact that the City Council had gone into great detail in making appropriations because it has never been definitely decided just how far it is necessary to particularize the objects and purposes of appropriation. Section 2 of Article VII of the Cities and Villages Act says that the City Council must "specify the objects and purposes for which such appropriations are made and the amount appropriated for each object or purpose." Section 1 of Article VIII requires that the tax levy shall be made "by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively."

There has been some apparent conflict in the opinions of the reviewing courts as to the necessity for the elaborate specification made by the City Council. There is no purpose in pointing out wherein we look upon the decisions as conflicting. We will therefore confine ourselves to saying that the case of *People ex rel. Fuller v. P., D. & E. R. R. Co.*, 116 Ill. 410, would seem to indicate that an appropriation for a lump sum for a department fulfills the requirements of the statute, while such cases as *People ex rel. Stuckart v. Klee*, 282 Ill. 440, demand a much more detailed specification of appropriations.

It is perhaps desirable to have such complete detailed appropriations as have been made in recent years, but such distribution into separate items has caused embarrassment which finally led to the enactment of the section here under consideration. It was designed to overcome some of the difficulties that arise on account of detailed appropriations, but was not intended to permit and probably will not be construed as permitting the throwing down of all safeguards against bulk appropriations. The power to make transfers must be so used that it will not override statutes that are still in force and so that it will not nullify the appropriation bill.

In our opinion a reasonable construction of the statute in question is that the appropriation bill shall continue to be

the authority to which the head of a department looks for the right to spend the money of the city, but that in case there is a shortage of money for any particular purpose and some other appropriation within the department can be found which can stand a draft upon it this statute affords a means of supplying the deficiency. Just where the line is to be drawn is difficult to say, but it is quite clear that such a general redistribution of appropriations as will amount to a reconstruction of the annual appropriation bill will not be tolerated by the courts. The activities provided for therein must first be met, and then if the need exists for a transfer of funds which can be accomplished without wiping out any such activity, a transfer can be made. To this end the Law Department has always construed the provision for transfers liberally as permitting such a transfer from one bureau or division to another within the same department. The law cannot be construed, however, as permitting any or every kind of a transfer that will wipe out activities that have been appropriated for, because transfers of such a radical nature would really be equivalent to making bulk appropriations.

Again, the word "transfer" as used in the act, implies that the City Council has already provided the manner in which the money shifted by the order of the City Council is to be expended. It does not follow necessarily that the use of money for a different position or an additional position or some purpose that is not expressly mentioned in the appropriation ordinance would be beyond the power of the Council, but, broadly speaking, the general purpose for which the money is to be used must be set up in the appropriation bill in order to accomplish a transfer within the meaning of this statute, otherwise it would be a new appropriation.

Proceeding now to the specific question that you ask, we take up the first one, which reads as follows:

"May the City Council, by transfer of all or part of an account, eliminate or reduce one activity within a department and can the department head apply the amount so transferred to an entirely new activity or augment one already existing?"

Our answer to this question is, that there is no doubt that a transfer can be made so as to reduce one activity within a department and augment another already existing, although this cannot be done by the department head until authority is given to him to do so by the making of a transfer. There is doubt with respect to the elimination of the activity altogether, as we have indicated above, and we believe there is even greater doubt in the case of an entirely new activity being brought into existence through the instrumentality of a transfer. We would say that it would be a severe stretch of the law to permit either of the two latter things to be done.

Your second question is as follows:

“If the answer to No. 1 is affirmative, in order that the augmented activity may be carried on properly, an entirely different class of employes from those used in the decreased activity may be necessary. May the Council, in such transfer ordinance, designate the titles for and compensation of such employes, provided that by so doing the total appropriation as set up in the annual appropriation bill be not thereby increased, and may the department fill such positions?”

Our answer to this question is that there is nothing in the law which prohibits the designation of titles for and compensation of employes provided for when the transfer is made, always assuming that the general purpose has already been specified in the annual appropriation bill.

The appropriation bill contains a restriction that applies to the comptroller and the heads of other departments (see Section 4). This section prohibits such heads of departments from incurring any liabilities against any account in excess of the amount authorized for such account, and from changing any salary or wage item therein, also from incurring any liability which will necessitate a transfer from the appropriations for salaries and wages in their respective departments.

There is nothing in the appropriation bill which warrants the conclusion that the City Council intended to cut itself off from making such a transfer as the heads of the departments are prohibited from making. The prohibition is directed against the officers designated, and it would be

extending the prohibition by implication if we were to construe it so as to deprive the City Council of the power to make the transfers in question. Hence, we believe that it is within the power of the City Council, when it makes a transfer, to designate, whenever necessary, titles for and compensation of employes thus provided for.

At this point it is proper to call attention to a clause in Section 3 of Part Two of Article XII of the Cities and Villages Act, which provides that:

“The compensation of all officers shall be by salary, as fixed in the annual appropriation bill, by the City Council, and the compensation of no officer shall be altered during the same fiscal year.”

The practical construction of this clause has always been that it relates to officers as distinguished from employes. The Supreme Court in two very recent cases has fortified us in the position that there is a distinction between an officer and employe of a municipality that would apply in such a case as this. (*People v. Vogt*, 262 Ill. 170; *People v. Coffin*, 282 Ill. 599.)

In view of the fact that the Supreme Court has drawn the distinction above referred to, we believe that the statute which prohibits the changing of the salary of an “officer” may be construed as implying that the salary of an employe can be changed. The question is not entirely free from doubt, as there is no decision squarely in point, and this question may ultimately have to be decided by the courts. In the meanwhile, there being no express prohibition against such a change of salary for employes, we are of the opinion that the City Council would be justified in making the change if it is deemed necessary.

Your next question reads as follows:

“May the City Council, by transfer from a material—and—supplies account, or a similar account, to a salary account, in such ordinance provide for increased compensation of groups of employes for the balance of the year, where the rates of such compensation are specifically set up in the appropriation ordinance and the totals extended?”

By the same course of reasoning that we have adopted in answering the first two questions we come to the conclusion that this may be done by the City Council, always provided that the total appropriation is not increased and that the transfer is made from one or more specified objects to one or more specified objects already generally enumerated.

Your fourth question, after setting up the facts in regard to the appropriation for cleaning of streets, etc., concludes as follows:

“Can it be held that the setting up on page 617 of the wage rate, limits the Department of Public Works from expending Account 81-S in any way permitted by proper control, and can a compensation in excess of that set up on page 617 be allowed?”

The difference between this state of affairs and the conditions already referred to consists in the fact that there are in this instance no employes specifically provided for on a salary basis. The only provision made for them is at a rate per day as needed. This implies necessarily that the service of these parties can be contracted for from time to time as required, and, therefore, in a stronger sense than in the case of employes regularly provided for, the transfer can be made if the City Council sees fit to do so. That is to say, while the wages to be paid are set up, it may be necessary to bid against other employers of labor for the temporary employment of the persons who are to do the work, and there is under those conditions no restriction on the power of the Council to adapt itself to the circumstances.

Your fifth question does not seem to be complete. It reads as follows:

“As you know, a capital account is a revolving fund which is kept intact by means of reimbursements for work done by the account for customer departments and bureaus. Once appropriated, no annual appropriation is thereafter made, except to increase or decrease the fund, or to make up a deficit. (See electric wiring and repair capital account, page 605.)”

We assume that what you have omitted was the query as to whether employes who look to the capital account for their

salaries would be entitled to an increase in salary in view of the fact that there is no enlargement of the capital account required.

With reference to this question, if we have correctly stated it, we can only say that the same rule applies to such employes as applies in the case of all other employes. That is to say, if there is a transfer made, as indicated above, without increasing the appropriation necessary, the change can be effected.

Your sixth question is as follows:

“May the Council change the rate of compensation of any employe or a group of employes, during the last six months of the year without increasing the total of the item, necessitating lay-off or transfer of funds when the amount is exhausted?”

We believe this question has already been answered by what was said in reply to questions No. 2 and No. 3. The increase of the salary of any person which necessitates a lay-off or transfer of further funds when the amount now appropriated is exhausted is subject to the limitation that we have already mentioned with reference to eliminating an activity. In other words, if it becomes necessary to close down some activity by reason of increasing the pay of one or more employes, we would regard it as advisable to make a transfer of sufficient funds at the time the increase in pay is decided upon to last the remainder of the year, so that the activity need not be shut down.

Your last question is as follows:

“May the rates set up for mechanics and laborers be increased on the ground that no appropriation has been actually made for any of them and that the only limitation is ‘at \$ per day’?”

We believe that this question has been fully answered, since it is practically the same question as the one involved in the Street Cleaning Bureau. The employe is not specially named or appropriated for, but an allowance is made at a rate per day which may be changed when the occasion demands it.

We have endeavored to answer your specific questions in a manner as nearly categorical as the circumstances will per-

mit, but we suggest to you that in applying the answer in each case you bear in mind the general remarks made in this communication which appear before the specific answers to your questions.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Validity of Requisitions.

July 10, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of a communication from you under date of July 9, in which you advise us that there have been presented to your office for approval requisitions by the general superintendent of police for sundry supplies, and that on the requisitions in question, in addition to the name of Chief Garrity, appear the names of Second Deputy Superintendent of Police Charles E. Frazier, and Secretary Si Mayer, and that other of the requisitions bear the signature of W. W. Smith, manager of properties.

In your communication you advise us that in accordance with a Council order passed monthly, the Finance Committee request that all requisitions be submitted to the Finance Committee staff before being passed by the city comptroller's office, and that the Finance Committee has returned some 40 or 50 of these requisitions, all dated subsequent to July 1st, because of the signatures appearing thereon of Charles E. Frazier, second deputy superintendent of police, and W. W. Smith, manager of properties, and request us to furnish you with an opinion concerning the procedure taken with the above requisitions; and also as to the legality of the signatures appearing on the same.

In reply to your first query, we desire to advise you that

the monthly order passed by the City Council, and referred to in your communication, was passed for the purpose of enabling the city to carry on the necessary activities required to be performed, and to provide for payment of the same pending the passage of the Annual Appropriation Bill.

The last one of these orders passed by the City Council provided for and was limited to the month of June, 1919. On June 30, 1919, the Council passed the Annual Appropriation Bill. The request of the Finance Committee that all requisitions be submitted to the Finance Committee staff before being passed by your office was intended to remain in force only until the passage of the Annual Appropriation Bill by the Council, and there is now no longer any necessity for your office to submit any requisitions to the Finance Committee staff before the same receive your approval.

The signatures that you say appear on the various requisitions, viz.: Charles E. Frazier, second deputy superintendent of police, and W. W. Smith, manager of properties, are the names of the persons who have been and who are now occupying the respective offices of second deputy superintendent of police and manager of properties.

All of the requisitions bear the signature and approval of the general superintendent of police, who is the head of the police department, and requisitions are never presented to him for his signature until the same receive the approval of the various heads of bureaus in the Department of Police.

We desire to advise you that the offices of second deputy superintendent of police and manager of properties are both offices created by ordinance, and under the terms and provisions of Section 2 of Article VI, Chapter 24, Hurd's Revised Statutes, the said offices, having been created by ordinance of the City Council, can only be abolished by an ordinance of the Council passed by a two-thirds vote of all the aldermen elected, which ordinance, the statute provides, shall not take effect until the end of the fiscal year.

Both Frazier and Smith are civil service employes and were certified to their respective positions by the Civil Service Commission of the City of Chicago, and they are entitled to

and it is their duty under the law to discharge the duties of the respective offices until the said offices are abolished by the Council in accordance with law.

You are therefore advised, and it is your duty, under the law, to recognize their signatures appearing upon requisitions until this department advises you to the contrary.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Failure to Appropriate for Officers and Employes.

Chicago, July 11, 1919.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

In your two letters of July 8, 1919, you make inquiry concerning the effect of the failure to appropriate for the salaries of the second deputy superintendent of police and other persons connected with his office. One of these letters relates to the offices expressly created by ordinance, the other to positions which existed by virtue of appropriations heretofore made for them. Inasmuch as the questions are closely related to each other, we will answer both letters in this opinion.

Section 1907 of The Chicago Code of 1911, as amended, creates the Department of Police and says it shall embrace a general superintendent of police and other officers specifically named, "and such number of captains, lieutenants, sergeants, patrolmen, patrolwomen, dog-catchers, two kennelmen, matrons, surgeons, operators, drivers, chauffeurs, inspectors, instructors, clerks and employes as may from time to time be provided for in the annual appropriation ordinance." Among the officers specifically named are the second deputy superintendent of police, department inspector, inspector of moral conditions and manager of properties, concerning whom

you have made inquiry. There is no specific mention of senior stenographer, clerk, inspector of personnel or junior stenographer, concerning whom you also inquire, and therefore these are included among the "inspectors," "clerks" and "employees" whose official existence depends on provision being made for them in the annual appropriation ordinance.

The first paragraph of Section 1908 of the Code, as amended, reads as follows:

"1908. There are hereby created the offices of general superintendent of police, first deputy superintendent of police, second deputy superintendent of police, chief of detectives, chief identification inspector, chief surgeon, foreman of horses, pound-master, chief operator, manager of properties, foreman of shops, department inspector, inspector of moral conditions, director of instruction, custodian of lost and stolen property, secretary of the department, secretary to the general superintendent of police, head clerk of the detective bureau, drillmaster, and such number of captains, lieutenants, sergeants, patrolmen, patrolwomen, dog-catchers, two kennel men, operators, matrons and inspectors as may from time to time be provided for in the annual appropriation ordinance."

It will thus be seen that the City Council created certain offices with official titles which do not depend for their existence on the annual appropriation ordinance, while others not specifically named, or distinguished by an official title that relates only to a single office, exist only when provision is made for them in the annual appropriation bill.

We find that the distinction made in the Code between these two classes of officers is always recognized and taken into account when a question of the kind presented by you is considered by the courts. The gist of the decisions on this point is that where an office is expressly created by statute or ordinance, independently of a mere appropriation for same, the office continues to exist even if no appropriation is made for it; while in the case of an office which exists only by virtue of an appropriation being made for it, such office ceases to exist when the appropriation is dropped. There is an exception to this latter rule where it can be shown that the appropriation has been merely shifted to some other offi-

cer who performs the same duties under a different title, the courts holding in such a case that such shift is an evasion of the Civil Service Law. (*City of Chicago v. Luthardt*, 191 Ill. 516.)

To illustrate the distinction we draw, we point to the case of *Fitzsimmons v. O'Neill*, 214 Ill. 494, where the court held that the dropping of the foreman of the repair shop was lawful when no appropriation was made for the position and such action was taken in good faith for the purpose of reducing expenses.

The court said (p. 505):

"When, therefore, the Common Council omitted to make an appropriation, and the duties of the position were turned over to some other official, who for that reason received no addition to his compensation, the position was in fact and in effect abolished."

But at the same time the court, having in mind that the rule was different in the case of an office created by ordinance, took occasion to point out the following (p. 504):

"There is nothing to show that the position of foreman of the repair shop in the police department of the city was created by any ordinance, or legislative act, of the Common Council of the city; nor is there anything to show that such foreman, when appointed, was appointed for any particular period of time."

The same distinction has been made in New York cases. (See *People ex rel. Corrigan v. Mayor*, etc., 149 N. Y. 225.)

With respect to offices which are expressly created by ordinance, we find that the statute provides as follows:

"§2. The City Council may, in its discretion, from time to time, by ordinance passed by a vote of two-thirds of all the aldermen elected, provide for the election by the legal voters of the city, or the appointment by the mayor, with the approval of the City Council, of a city collector, a city marshal, a city superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said Council be deemed necessary or expedient. The City Council may, by a like vote, by ordinance or resolution, to take effect at the end of the then fiscal year, discontinue any office so created, and devolve the duties thereof on any other

city officer; and no officer filling any such office so discontinued, shall have any claim against the city on account of his salary, after such discontinuance. The city marshal shall perform such duties as shall be prescribed by the City Council for the preservation of the public peace, and the observance and enforcement of the ordinances and laws; he shall possess the power and authority of a constable at common law, and under the statutes of this state.'

Article VI, Sec. 2, Cities and Villages Act.

In applying the above statute to the case under consideration it might be contended that the offices here created are not the kind mentioned in the statute, because they are neither elected nor appointed by the mayor with the approval of the City Council. But we are at once confronted with the decision in the case of *Kucharski v. Harrison, et al.*, 264 Ill. 563, where it was held that the offices of second deputy superintendent of police and inspector of moral conditions were in fact offices which come within the provisions of the section above quoted, and, since the other two offices are on precisely the same footing, the decision holds good as to all.

In the case last cited the court holds as follows:

"Appellant concedes that if Funkhouser and Danenberg were *de facto* officers exercising the duties of a *de jure* office the remedy by a bill for an injunction is not the proper one, as in such case a court of equity will not restrain officers from performing the duties and receiving the salaries of such offices. It is not denied the City Council had authority to create the offices of second deputy superintendent of police and inspector of moral conditions, but it is contended the ordinance creating them is invalid, because they were authorized by said ordinances to be filled contrary to the provisions of the Civil Service Act. Beyond question the City Council had authority, under Sections 2 and 3 of Article 6 of the Cities and Villages Act, to create said offices and prescribe their duties and powers. (*People v. McCann*, 247 Ill. 130; *Moon v. Mayor*, 214 *id.* 40; *Stott v. City of Chicago*, 205 *id.* 281.) * * * If the Council had authority to create said offices and they were created in the manner required by law, would the fact that the ordinance authorized filling them in an illegal manner render void the ordinance creating the offices? We think the answers

must be in the negative unless the alleged invalid provisions in the ordinance render the whole ordinance void. A part of a statute or ordinance may be invalid and a part valid, unless all the provisions are so connected in subject matter and so dependent upon each other as to warrant the belief that the legislative body would not have passed the valid part independently of the invalid part.

* * * *

Under the rules of construction we think it must be held that if the parts of the ordinance appellant alleges are invalid are so in fact, still it would not invalidate the whole ordinance, and by the valid portions of the ordinance the offices of second deputy superintendent of police and inspector of moral conditions were created and are *de jure* offices, and their status as such offices would not be affected even though the ordinance contained invalid provisions as to the manner of filling said offices. The offices having been legally created, the right of *de facto* incumbents to hold them, discharge their duties and receive the salaries provided by law could not be inquired into in this form of action."

Kucharski v. Harrison, 264 Ill. 563.

The gist of the above decision is that the offices in question are lawfully created, and that any irregularity in filling the offices could only be inquired into by *quo warranto*.

We are not concerned in the present instance with any question of irregularity of filling the positions, and the decision is conclusive on the point that the offices exist and are within the provisions of the statute above set forth. That statute provides how the offices may be discontinued—by ordinance or resolution passed by a two-thirds vote, to take effect at the end of the fiscal year. The statute goes farther, and says that "after such discontinuance" no officer filling any such office shall have any claim against the city on account of his salary. The inference is plain that before such discontinuance the officer filling the position has such a claim.

Our conclusion, therefore, is that the second deputy superintendent of police, the department inspector, the inspector of moral conditions, and the manager of properties hold offices that are not discontinued and that they are entitled to the

salaries and emoluments pertaining to same. As to the remaining positions, they are "in fact and in effect" abolished under the rule laid down in *Fitzsimmons v. O'Neill*, from which we quoted.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:
SAMUEL A. ETTELSON,
Corporation Counsel.

Analysis of Zoning Bill.

July 16, 1919.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Buildings and City Hall.

Dear Sir:

In response to your request, asking for an analysis and opinion concerning the Zoning Bill recently passed by the General Assembly, we submit the following:

The act in question is designed purely and simply as an enabling act and the design of the framers was to permit as much latitude to the City Council as possible and at the same time protect the property owners interested, so that no hasty or ill-advised action or action without notice to them should be taken. It consists of five sections. The first section gives the authority to the City Council to adopt such legislation as may be necessary to accomplish the purposes of the act and the other sections provide for such a procedure as to prevent any such abuse as might occur if the procedure were not followed strictly.

A reading of the first section will give as clear an idea of what may be done under the act as an analysis of same. The said section reads as follows:

"SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That in addition to existing powers, and to the end that adequate light, pure air and safety from fire and other dangers may be secured, that the taxable value of land

and buildings throughout the city or village may be conserved, that congestion in the public streets may be lessened or avoided, and that the public health, safety, comfort and welfare may otherwise be promoted, the City Council in each city and the president and Board of Trustees in each village, shall have the following powers:

“To regulate and limit the height and bulk of buildings hereafter to be erected, to regulate and limit the intensity of the use of lot areas and to regulate and determine the area of yards, courts and other open spaces within and surrounding such buildings; to classify, regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to make regulations designating the trades and industries that shall be excluded or subjected to special regulations within fixed districts and designating uses for which buildings may not be erected or altered in such district; to divide the city or village or portions of same into districts of such number, shape or area as may be deemed best suited to carry out the purposes of this act, including the power to create and establish residential districts within which new buildings designed for business may be excluded, restricted or limited, and including the power to regulate and restrict the location of trades and industries and buildings designed for same in such a way that classes of industries which affect the general comfort of the public may be excluded from districts where commercial and professional pursuits which do not affect the comfort of the public are carried on; and to prevent the alteration or remodelling of existing buildings in such a way as to avoid the restrictions and limitations lawfully imposed on any such district: *Provided*, that in ordinances passed under the authority of this act due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city or village, and the uses to which property is devoted at the time of the enactment of any such ordinance, and that the powers by this act given shall not be exercised so as to deprive the owner of any existing property of its use for the purpose to which it is then lawfully devoted, *And provided, further*, that nothing in this act shall be construed to prevent additions to and alterations of any existing plant or building made to further the purpose to which it is then lawfully devoted.”

If anything need be added to the above by way of explanation, it is that by said act it will be possible to carve out residential, commercial and industrial sections wherever it is desirable and feasible to do so, in order that there may be a segregation that will inure to the benefit of both the owners of the property and the public in general. It will be possible to establish residential districts, to prescribe building lines, to fix the intensity of the use of the lot, and the heights of the buildings thereon always provided that such regulations are kept within reasonable limits and tend towards the promotion of the objects expressed in the first paragraph of Section 1 as quoted above. In such residential districts business buildings may be restricted or excluded altogether unless such buildings are in existence at the time of the passage of the ordinance. There are probably other restrictions and regulations that could be applied to such districts that will occur to the Council or members thereof when ordinances come up for consideration.

With regard to commercial and industrial districts the way is left open for restricting the location of trades and industries which affect the general comfort of the public so that the class of businesses which may become nuisances or are in fact nuisances by their very nature may be kept away from districts that are used for commercial and residential purposes. The sections which relate to the procedure have for their object primarily full publicity and an opportunity for objection on the part of those who are interested. It was not deemed advisable to put so great a power as must be exercised in these matters in the hands of one officer. The way was therefore left open for creating a commission, board or committee, but whoever is placed on the same will be a city officer and necessarily the positions will have to be created by ordinance in the manner described by statute.

There will have to be an ordinance passed creating the offices or designating the officers who will have charge of these matters; that is to say, the City Council may provide an entirely distinct and separate body or it may designate certain officers who are now in the office as the commission, board or

committee. The initial ordinance creating this commission, board or committee may be one that provides for the duties and takes care of many of the functions of the board, or it may stop after it has created the board and leave all future action to the individual ordinances that are passed from time to time.

Our recommendation in regard to this is that an initial ordinance be prepared which not only creates the commission, board or committee but prescribes its duties fully and in a general way outlines the course of procedure that is to follow, makes definition of the various districts and of the terms to be used in the ordinances to be passed in the future. To illustrate what we have reference to, we call attention to the fact that many questions have arisen in the past as to the meaning of the term "residential" or the clause "used exclusively for residential purposes." Such words or clauses should be accurately defined in order that the various officers of the city that will have to do with the districts in question will know exactly where they stand. All these things can be taken care of in an ordinance which lays the groundwork for the passage of ordinances in the future.

We apprehend that this initial work will have to be given a great deal of attention in order that a proper start may be made. Along with the papers submitted to us was a copy of a resolution bearing the name of Alderman Guernsey of the Seventh Ward. It is not stated just what disposition you want us to make of same, but we find many objections to it. In the first place, what is proposed there cannot be done by a resolution, and in the second place, this resolution contemplates the appointment of a commission on building the districts and the appointment of officers and employes by the commission. There are legal difficulties in the way of this.

We have nothing further to submit on this proposition at the present time, and suggest that if you desire additional information questions should be asked which we will endeavor to answer.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Refusal of Building Permits.

July 21, 1919.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Buildings.
Dear Sir:

You submitted to us draft of an order directing that "until the Zoning Ordinance has been passed" the commissioner of buildings shall refuse to issue permits for buildings in residential neighborhoods where protests are filed, without first securing the consent of the City Council, and you ask whether such an order would be valid.

It is our opinion that such an order would not be valid. The ordinances of the city prescribe that permits should be issued under certain conditions. You cannot suspend the operation of an ordinance for a limited time in this way. Nor is it proper to override the provisions of an ordinance by an order, the rule being that an ordinance can be repealed, amended or modified only by a legislative enactment of equal dignity.

Again, the proposed order presupposes the passage of a zoning ordinance. There is no intimation of what is meant by a "zoning ordinance" and there can be no presumption in law that one will ever be passed.

Hence, the order as proposed would have no legal effect whatever, except possibly to protect the commissioner of buildings from personal liability.

We have drafted an ordinance providing for a hearing on the question of the issuance of a permit under such circumstances, which we believe is not open to as many objections as the proposed order, and we submit the same herewith. The ordinance drafted by us is subject to the test of reasonableness, and we are not prepared, without further consideration of the whole subject matter, to say whether, in the light of previous decisions on the points involved, our courts will hold the ordinance prepared by us valid. Our only reason for submitting the same at this time without fuller consideration is that the city council is about to adjourn for the summer and the passage of the ordinance prepared by us will probably

have the effect of holding the matter in abeyance until such time as a more comprehensive ordinance can be passed.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Legality of a Referendum for the Issuance of Bonds in
Excess of the City's Borrowing Power.**

July 21, 1919.

HON. JOHN A. RICHERT, Chairman, Committee on Finance.

Dear Sir:

Your committee has asked for an opinion concerning the legality of placing upon the ballot for the purpose of a referendum the question of issuance of bonds in excess of the city's borrowing power at the time of the referendum.

The constitutional limitation must always be based on the last assessment for state and county taxes previous to incurring the indebtedness. This does not mean, however, that the city is precluded from submitting to the voters a referendum on the question of issuing bonds merely because such bonds, if issued, would go beyond the limitation. The rule is stated in Dillon, as follows:

“Where a vote is required, the validity of bonds issued pursuant to such vote is to be determined by the last assessed valuation of the property before the bonds are issued, not the last assessment before they are voted or directed to be issued.” (Dillon on Municipal Corporations, 5th 2d. Section 207)

In case the law as above stated were not in force in this jurisdiction the City of Chicago would at the present moment be unable to submit for approval by the voters any bond issue whatsoever, because its debt limitation would prevent the issuance of more than the merest trifle in amount beyond such bonds as are already authorized.

If upon taking such vote on a referendum a larger amount

of bonds should be authorized than the city can lawfully issue, the question of the validity of such bonds would depend on when they were issued. If only a part were issued at a time they would be valid up to such time as the city had power under its debt limitation to issue them and the balance would be invalid. If they are all issued at the same time, then each bond would be void in proportion to the excess of the entire issue over the debt limitation. We quote the following from the same author on this point:

“§ 203. PARTIAL VALIDITY OF OBLIGATION.) If the city has not reached the constitutional limit of its indebtedness at the time when the obligation is incurred, but has so nearly approached the limit *that only a part of the amount agreed to be paid is within the limit and the remainder beyond*, the question arises to what extent the obligation is valid. If the debt is evidenced by bonds which are issued and delivered *at different dates*, the bonds first issued and delivered are valid, although the remainder of the issue may exceed the constitutional limit. If, however, the bonds *are issued at the same time*, or as part of one transaction, or if the contract calls for the payment of a gross sum, which in part only exceeds the constitutional limit of indebtedness, the just and equitable rule as we regard it has been adopted that each obligation should be void in a sum in proportion to the excess and valid as to the remainder.”

(Dillon on Municipal Corporations, 5th Ed., Sec. 203.)

From the above it will be seen that the right to put a proposition for the issuance of bonds upon the ballot for approval does not depend on the condition of the city's finances or the extent to which it may become indebted, but the right to issue bonds after they are authorized is governed by such limitation.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,
Corporation Counsel.

Complaint Against Yellow Taxicab Co.

July 24, 1919.

COL. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir :

I beg leave to acknowledge receipt of the communications sent to you by E. N. Nockels, secretary of the Chicago Federation of Labor in regard to a controversy existing between the Yellow Taxicab Company and various independent cab owners who are members of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers Union, Local No. 727, together with a report on the situation submitted to you by Sergeant William S. Orthman.

Mr. Nockels, in his communication of January 17, 1919, says that there are some 500 licensed individual taxicab owners who own and operate their own taxicabs upon the streets of Chicago for public hire, and that the Yellow Taxicab Company also operates taxicabs on the public streets of Chicago for public hire. He charges in his communication that the Yellow Cab Company employs what is commonly known as a "slugging crew," and that this crew is furnished with a high power touring car by the Yellow Cab Company to roam the streets at night armed with guns and black jacks in order to slug the drivers and wreck the cabs of the individual cab owners they may happen to meet, and charges that on many occasions this so-called "slugging crew" has had the assistance of the police, who, he charges, have refused to listen to the complaints of citizens, and that they have been guilty of witnessing assaults upon the individual cab drivers. He also says in his communication that he has made complaint to the state's attorney of Cook County without any result.

The report of Sergeant William S. Orthman to you discloses the fact that the police have been quite diligent in preventing assaults upon the individual cab owners by employees of the Yellow Taxicab Company, and he has furnished to you the names of persons who are presumed to comprise the slugging crew referred to by Mr. Nockels in his letter. He also informs you that all of the persons whom he has learned are

members of the slugging crew, are deputy sheriffs, and it is our opinion that you should call the attention of the sheriff of Cook County to this fact. If it be true, as stated, that these persons are deputy sheriffs of Cook County, they are authorized as such under the law to carry revolvers. They have, however, no right to violate the law and make assaults upon any class of citizens. If they are guilty of acts of that kind the owners of the individual taxicabs, or their attorneys, should procure warrants and cause their arrest, when the question as to their guilt may be tried in the courts. Where the names of the so-called slugging crew are known, it ought to be an easy matter to put an end to their unlawful conduct by having the persons whom they assault swear out warrants and cause their arrest.

You might make known to Mr. Nockels the names that have been furnished to you of persons who are presumed to be members of the slugging crew in order that he and his friends may have an opportunity to identify them if they are the guilty persons.

Officers should be instructed to arrest any persons guilty of assaulting individual cab owners or other citizens on the public highway of the city in their presence, regardless of whether or not the persons guilty of assault are deputy sheriffs. A deputy sheriff has no more right to violate the law than any other citizen, and if he does so he should be tried as any citizen would be for violating criminal laws of the state.

Yours very truly,

JAMES W. BREEN,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,

Corporation Counsel.

Orders Concerning Salary Adjustments.

Chicago, July 26, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of two letters from you relating to adjustments of salaries in accordance with recent action of the

City Council. One of these letters relates particularly to the Bureau of Water, the other to your department generally. Since a part of our reply will be applicable in each instance, we take the liberty of covering both in one opinion. The questions involve the rights of temporary appointees, and we take them up in succession after discussing the situation presented by the passage of the various ordinances and orders that are before us.

The City Council on January 13, 1919, passed an ordinance granting authority to pay city officers and employes for the month of January the amount per month authorized for 1918, subject however to such changes as might be made by the annual appropriation bill. (Council Journal, p. 1445.) Provision was made in that ordinance for deduction from the pay of such employes at a later date in case their salaries were reduced, and in case they were advanced they would necessarily have to receive the additional compensation. This status was kept intact from month to month, except in so far as it was modified (if at all) by an ordinance passed April 2, 1919, which made appropriations from the water fund, vehicle tax fund, etc.

We do not think it necessary to take up the question of the legal effect of the passage of the ordinance of April 2nd, because it was clearly the intention of the City Council, when it re-enacted the provisions of same with modifications as a part of the annual appropriation bill, to amend that ordinance so that the salaries fixed later would take the place of those named therein. Therefore, the ordinance of April 2nd does not alter the situation.

On June 30, 1919, the annual appropriation bill was passed. It was amended on July 7, 1919, and became effective on July 21, 1919. It fixed the salaries of officers and employes for the fiscal year, and by the terms of same taken in connection with the previous action concerning compensation to be paid up to the time of the passage of same, must be construed as contemplating that the salaries thus fixed dated from January first.

Under the law as we view it, the City Council, when it

passed the appropriation bill, determined what the salaries of city officers and employes should be for the period extending from January first to the time of passage of the bill. So far as officers are concerned, the salaries fixed in the appropriation bill are the salaries for the year and cannot be changed. With respect to employes who are not officers there exists no inhibition in the statutes which prevents a change in salary if made by ordinance after the passage of the appropriation bill, but such change under the conditions named will not relate back to the beginning of the fiscal year.

In other words, the rights of employes as to salaries for the first six months of the current year were fixed when the appropriation bill was passed, and they were not affected by any order that was passed thereafter.

It has been the practice for several years last past to follow up the annual appropriation bill with an order designed to fix salaries of those employes who by reason of their civil service grading may come within a maximum according to efficiency and seniority. This practice is not an effective way of dealing with this subject. If there is a conflict between the ordinance and the order as to any employe so situated, the order must inevitably give way. There are a number of reasons for this aside from the general rule that an order cannot override an ordinance. In order to make such provisions valid they must either be incorporated in the appropriation bill or they must be adopted by a general ordinance that is effective at the time the appropriation bill is passed. In the latter event the appropriation bill will be construed with the general ordinance and effect will be given to both if possible.

These general observations apply to both regular civil service employes and persons employed by temporary appointment under authority given in the Civil Service Act.

On July 21st the City Council passed two orders relating to salaries of temporary appointees. We are not advised as to whether these orders have been signed by the mayor, but for the purposes of this opinion we will assume that they will not be vetoed, and will take up the questions, first, whether

they actually change the provisions of the annual appropriation bill, and second, whether they can be given effect if they do make such change.

The first of these orders is in the main similar to the one that was passed last year. It consists of 13 sections, of which Sections 2 and 3 read as follows:

“SECTION 2. Whenever any grade or rank in the classified service of the city shall have been divided into salary groups for the purpose of varying compensation according to efficiency and seniority, and the City Council shall have appropriated according to such salary groups for the positions in said grades of service, *all appointments (including appointments under temporary authority)* by the head of the department or by the appointing officer shall be to the group having the lowest fixed salary rate. Advancement from a lower to a higher salary group shall be made on the basis of efficiency and of seniority within the department and in accordance with schedules of salary groups in force and effect December 31, 1918, as shown by the records kept in the office of the Civil Service Commission; *provided, that there shall be no salary advancement for persons working under temporary authority.*

“SECTION 3. Whenever the City Council through appropriation shall have increased the salary heretofore established for any salary groups of any grade of the classified service, the amount of said increase shall apply as of January 1, 1919, on the salaries heretofore established for all employes classified in said salary groups according to their eligibility, in accordance with the provisions of this rule.”

The important particulars in which this order differs from the order passed in 1918 is that appointments under temporary authority were by express language included among those to which the rule of the lowest salary group applies, and the proviso regarding salary advancements for persons working under temporary authority was added. (See italicized portions of Section 2.)

Even if we were to give this order the force of an ordinance, it does not seem to affect the temporary appointees who were appointed prior to its passage. Such appointees are holding their positions under the law as it existed at the time

of their appointment. The most that this order (if given the effect of an ordinance) does is to say that where appropriations are made according to salary groups, the appointing officer should appoint to the group having the lowest salary rate and that there shall be no advancement for persons working under temporary authority. This would apply to future appointments only, since there will be no new appointment of those who already hold their positions by virtue of prior appointments.

There is no court decision to which we can look for light as to the rights of temporary appointees. But it may be safely said that in the absence of any statute or ordinance on the subject, the only common-sense interpretation of the law in regard to such appointments is that where a person is appointed temporarily to take the place of another he takes it with the salary that the incumbent who preceded him was getting. If it is the intention of the Council that a temporary employe should always take a place at the lowest salary permissible under the law such intention can only be put into effect by a proper ordinance.

The temporary employes who were in the city's service at the time the appropriation bill was passed were not subject to any such rule as is now embodied in the order in question, so far as appointment at the lowest salary is concerned. With respect to advancement, we are not called upon to discuss the question whether a temporary employe can be advanced under the ordinances and rules now in force concerning civil service employes.

The other order passed on July 21st reads as follows:

“ORDERED, That the city comptroller and the heads of departments in making adjustments of rates paid to temporary employes shall make the same in accordance with the following:

“First. All temporary employes who were paid on the 1918 basis under Council authority to receive no further payments and to retain the payments heretofore paid.

“Second. All employes having left the service not to be paid any additional compensation covering the periods worked and paid for.”

This order is governed by the principle that we have indicated above. The rights of employes were fixed for the six months preceding its passage by the annual appropriation bill. This order cannot be used to vary legislative enactments which cover the same subject matter and which have the binding force of law.

If the annual appropriation bill were the only legislative act of the City Council on this point it might be said that the order was an interpretation of its provisions. But the City Council went on record from month to month by ordinance as providing temporarily for salaries which were to be adjusted by its final action when it passed the appropriation bill, the salaries were paid and accepted subject to such adjustment, and the Council cannot now, after making such adjustment, put an interpretation on its final act by an order which changes the provisions of this series of ordinances.

Finally, we are of the opinion that the two orders, in so far as they attempt to change or modify the ordinances that preceded them, cannot be given effect. This conclusion is based on the well established rule that an ordinance cannot be amended, repealed or modified except by a legislative enactment of equal dignity; also by the fact that the rights of employes to salaries for the period involved have become vested.

We therefore answer your questions as follows:

1. Are these Council orders amendatory to the annual appropriation ordinance?

Answer: These orders cannot have the effect of amending the annual appropriation bill. That can only be amended at the next regular meeting of the Council in the manner that other ordinances are amended.

2. The annual appropriation ordinance, in providing the rate of salary or wage of a position, does not differentiate between an employe appointed under temporary authority and an employe certified by civil service. Are the heads of departments forced to observe these Council orders in the administration of the appropriation ordinance?

Answer: The rights of employes were fixed by the annual appropriation ordinance, which, taken in connection with

ordinances that preceded it providing payment at rates to be adjusted by the annual appropriation bill, authorized the payment of salaries fixed therein from January 1st to the time of its passage, regardless of whether an employe was temporarily or permanently in the service of the city.

3. If the Council orders are effective, from what date are their provisions in force?

Answer: These orders could under no circumstances go into effect until the mayor has signed them or his veto power had lapsed. In so far as they conflict with ordinances or with civil service rules which have the force of statutes they cannot become effective at any time.

4. Another instance presents itself where employes working under temporary authority have received, prior to June 30, 1919, a salary based upon the appropriation ordinance of 1918, which is less than the minimum rates provided in the 1919 appropriation ordinance. Am I also restrained by said Council orders from authorizing payment of the difference between the amount appropriated and the amount the said employes have been paid?

Answer: The annual appropriation bill authorizes the payment of salaries on the basis of the appropriations made therein, and where the employe has received less than the salary appropriated you have the right to pay him the difference coming to him.

The further question of the right of employes who left the service to additional compensation according to the new salary rate has not been asked by you, but it is involved in the matter as presented, and such employes have the right to the additional compensation by reason of the fact that they were paid under ordinances granting them that right and with the understanding that they would receive the additional compensation or be compelled to restore any excess as the case may be.

Yours truly,
LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Status of Property Exempt from Taxation.

Chicago, July 30, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We are in receipt of the letter of the real estate agent concerning property of the city exempt from taxation.

At the recent session of the General Assembly an act was passed amending the revenue law so as to exempt certain city property that was heretofore taxed. This law went into effect on July 1, 1919. The real estate agent has requested the Board of Assessors to leave out this property from the assessment for the current year, but has received word that the assessors have the opinion of the state's attorney to the effect that the act in question was not in force early enough to relieve said property from taxes for the current year.

The amendment merely added certain property to the list of exempt property contained in Section 2 of the Revenue Act. It did not provide for any retrospective application of the new provision.

In the absence of any language making the same retroactive, the statute does not have the effect of exempting this property from taxation for the year 1919. Under such circumstances, the question whether the property is exempt is determined by the law in force on the first day of April, at which time the lien for taxes attaches to the property.

This was definitely decided in the year 1911, when the Supreme Court laid down this doctrine in the two following cases:

People ex rel. McCullough v. Logan Square Presbyterian Church, 249 Ill. 9.

People, etc., v. Deutsche Ev. Luth., etc., 249 Ill. 132.

We therefore beg to advise you that you cannot claim exemption for said property from the current year's taxes.

Yours truly,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

SAMUEL A. ETTTELSON,

Corporation Counsel.

Employment of Extra Patrolmen.

Chicago, Aug. 1, 1919.

HON. WM. HALE THOMPSON, Mayor.

Dear Sir:

In response to your inquiry concerning the possibility of employing 2,000 patrolmen and commanding officers in the police department in addition to those appropriated for, we respectfully submit the following:

There is nothing to prevent the City Council from ordering the employment of additional patrolmen until such time as the appropriation for same shall have been exhausted.

The appropriation reads as follows:

“Salaries and Wages—Patrolmen first grade at \$1,800 after two years' service; second grade at \$1,560 for second year of service; third grade at \$1,440.00 for first year of service.....\$5,977,000.”

It has been generally assumed, of course, that in employing patrolmen the general superintendent of police would bear in mind the necessity of having patrolmen all the year round, and therefore would distribute the fund thus appropriated so that a fixed number would be employed for the full year. But there is no legal difficulty in the way of altering this plan if the City Council sees fit to authorize a change. The appropriation of \$5,977,000 will remain the same, but if it is so used that 2,000 additional patrolmen are put to work, the employment of these men will be legal, and the only result will be that the appropriation will be exhausted before the end of the year.

In regard to commanding officers, this plan will not hold, because the appropriations fix the number of captains, lieutenants and sergeants to be employed. It will be possible to immediately employ extra commanding officers only in case a transfer of funds from some other appropriation within the department can be made.

Thus, it will be seen that the immediate employment of extra men will be possible, and the only difficulty remaining will be the question of how to obtain an additional appropria-

tion that will enable the city to keep the police employed after the present appropriation is exhausted.

There is only one way in which an additional appropriation for this purpose can be made after the expiration of the first half of the fiscal year. That is by submitting the question to a vote of the people.

A part of Section 2 of Article VII of the Cities and Villages Act reads as follows:

“No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by petition signed by them, or at a general or special election duly called therefor.”

It is manifest that a petition signed by a majority of the legal voters is impracticable; hence, our statement that the only way to accomplish the end is by submitting the proposition to a vote.

There will be a primary held on September 10, 1919, for the selection of candidates for delegates to the Constitutional Convention. There will be the full complement of judges and clerks at each polling place in the city on that day. The City Council could call a special election for the purpose of submitting the proposition in question for the same day as the primary, and provide that the judges and clerks at the primary shall be the judges and clerks for such special election, thus entailing no expense to the city except for the printing of ballots and minor incidental matters.

The people could by their vote in this way authorize an additional appropriation sufficient not only to cover the expense of the extra patrolmen but also to make good any deficiency arising on account of the transfer of funds for the payment of commanding officers—or, better still, an appropriation for commanding officers for the entire year could be thus authorized, and what money had been transferred for the purpose could be transferred back again.

It has been suggested that there may be power vested in the City Council to make an additional appropriation by a two-thirds vote on the theory that a casualty or accident has

occurred which would render such a procedure lawful. But there is no foundation for this belief. The casualty or accident contemplated by statute and the relief provided for same relate to improvements which have been destroyed or suddenly rendered necessary on account of some unforeseen accident. It cannot be construed as authorizing the enlargement of the police force.

The method we have outlined above in our opinion is feasible and would probably be successful. It should be understood, however, that our plan only legalizes an appropriation. The money for the purpose must be found by the proper authorities when the time for using same comes, and if it is not then secured a legal liability will have been incurred which will probably have to go to judgment.

Yours respectfully,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Referendum for Additional Appropriation.

August 5, 1919.

COMMITTEE ON FINANCE, City of Chicago.

Gentlemen:

We have your inquiry as to whether or not the following question may be submitted to the voters of the City of Chicago at the special election proposed to be called September 10, 1919:

“Shall the City Council of the City of Chicago make an additional appropriation for the fiscal year ending December 31, 1919, of \$600,000 for the Department of Police, for the employment during the remainder of said fiscal year of 1,000 police patrolmen in addition to those provided for by the Annual Appropriation Bill of 1919, and for the permanent employment of such 1,000 patrolmen after the year 1919, the payment for such additional patrolmen to be provided for by additional tax levy to be submitted to the Legislature in the year 1921?”

In reply, we beg to advise you that that part of the question reading as follows:

“Shall the City Council of the City of Chicago make an additional appropriation for the fiscal year ending December 31, 1919, of \$600,000 for the Department of Police, for the employment during the remainder of said fiscal year of 1,000 police patrolmen in addition to those provided for by the Annual Appropriation Bill of 1919,”

is proper in form and may be submitted as proposed.

The latter part of the question reading as follows:

“and for the permanent employment of such 1,000 patrolmen after the year 1919, the payment for such additional patrolmen to be provided for by additional tax levy to be submitted to the Legislature in the year 1921,”

should not be submitted for the following reasons:

The statute provides in Section 2, Article VII, of the Cities and Villages Act as follows:

“No further appropriations shall be made at any other time in such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or village, either by petition signed by them or at a general or special election duly called therefor.”

This provision of the statute contemplates that only the question of an additional appropriation after the passage of the Annual Appropriation Bill, and after the expiration of the statutory period for the passage of the same has expired, shall be submitted to the people for their approval.

The latter part of the question, involving as it does a question of public policy, should be separated from the question of appropriation, and may be submitted only in accordance with the provisions of an act entitled, “An Act providing for expression of opinion by electors on questions of public policy at a general or special election,” in force July 1, 1901, which by its terms requires a petition signed by 25 per cent of the registered voters of the incorporated city, and also that such petition must be filed with the proper election officers in each case not less than sixty days before the date of the election at which it is proposed to submit the question.

It is obvious that such question of policy, even if it is desired to submit the same, cannot be submitted in time for the proposed election of September 10, 1919.

We are, therefore, of the opinion that the question relating to additional appropriations must be submitted as a separate and distinct question unencumbered by any questions of public policy, and that, therefore, the latter part of the question submitted by you should be eliminated from any ordinance providing for a special election for submitting a proposition for making an additional appropriation for the Department of Police.

Yours very truly,

FRANK S. RIGHEIMER,

First Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Vacations and Sick Leave.

August 21, 1919.

HON. WILLIAM BURKHARDT, Deputy Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter relating to the question of whether employes working under temporary authority are entitled to vacation and sick leave, provided that such employes have worked for at least one year prior to the time of such vacation.

The following extracts from the order passed by the City Council on June 30, 1919 (Council Proceedings, page 660), govern the matter in question:

“ORDERED, That the executives of the various departments of the City of Chicago arrange and designate vacation periods and periods for sick leave for the current year by providing vacations of two (2) weeks, with pay, in accordance with the provisions of the Appropriation Bill, *for all employes* except those in the skilled labor and labor service classes who are employed on a

per diem basis, who have been engaged in the city's service for a period of at least one (1) year prior to such vacation. * * *

"ORDERED, *That all employees* except those in the skilled labor and labor service classes who are employed on a per diem basis, may be given leave of absence by their respective heads for periods not exceeding fifteen (15) days in the aggregate during any fiscal year on account of sickness or other cause for absence which may be considered by the department head a sufficient and legitimate excuse for the employee's failure to be present and in attendance upon his duties; but the reasons for the absence and the good faith of the employee in making application for such leave shall be shown to the department head by such reasonable evidence as he may require, either by a physician's certificate, personal affidavit or other means."

It is my opinion that the Council, in passing the above order, by using the words "for all employees," as italicized above, meant to include temporary employees who have served for a period of at least one year prior to such vacation. The order makes a provision for the exclusion of a certain class of employees, and that class does not include temporary employees.

A reasonable construction of the order would seem to be that the Council intends to give the vacations and sick leaves to all employees not expressly excluded in the order.

I am therefore of the opinion that the temporary employees, who have been in service for a period of one year prior to such vacation, will be entitled to a vacation, and further, that temporary employees will also be entitled to the sick leave period, as provided in the above mentioned ordinance.

Yours truly,

ADOLPH RADNITZER,
Assistant Corporation Counsel.

Approved:

EDWARD J. SMEJKAL,
Acting Corporation Counsel.

Right of Court Bailiffs to Keep Confiscated Revolvers.

August 21, 1919.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

We are in receipt of your communication of August 19, 1919, asking us to advise you as to whether or not the court bailiffs or clerks have a legal right to keep revolvers confiscated by the court, or whether such revolvers should be turned over to the city custodian.

Sections 2808 and 2810 of The Chicago Code of 1911, are as follows:

“§2808. CONFISCATION. Any such weapon or weapons duly adjudged by any judge of the Municipal Court of said city to have been worn or carried by any person in violation of the first section of this article shall be forfeited to and confiscated by the city, as hereinafter provided.”

“§2810. WARRANT—ARREST—HEARING. Upon complaint made, under oath or affirmation, to any judge of the Municipal Court, in said city, that any person has been guilty of violating any of the provisions of the first section of this article, a summons or warrant shall issue for the summoning or arrest of the offender, returnable forthwith. Upon the return of such summons or warrant, such judge shall proceed to the hearing and determination of the matter, and if it shall be adjudged that such person has violated any of the provisions of this article, the judge shall so adjudge, and order that the weapon or weapons shall be forfeited to, and confiscated by, the city.”

Section 1923 of The Chicago Code of 1911, is as follows:

“§1923. CUSTODIAN OF LOST OR STOLEN PROPERTY. The general superintendent of police shall appoint according to law a person to act as custodian of all property seized or taken by the police. The person so appointed shall be designated and known as the ‘custodian of lost or stolen property.’

“It shall be the duty of such custodian to keep a record of all property which may be seized or otherwise taken possession of by the Department of Police of the city; and, if such property so seized or taken possession of shall not be claimed by the rightful owner thereof and possession surrendered to such owner, within sixty days from

the date of such seizure or taking possession by the Department of Police, said custodian shall publish or cause to be published in the official newspaper of the city, a description of such property, together with the date of the seizure or the taking possession thereof, and shall give notice that if such property be not claimed by the rightful owner or owners thereof, within ten days from the date of such publication, such property will be sold at public auction, at such place and in such manner as the general superintendent of police shall prescribe. * * * provided, further, that none of the provisions of this section shall apply to pistols, revolvers, derringers, bowie knives, dirks, slung-shots, metallic knuckles or other deadly weapons of like character, but all such weapons shall within six months after their receipt by such custodian be transported by such custodian or his duly appointed deputy to a point in Lake Michigan at least five miles from the shore line and there deposited at the bottom of said lake."

In any case where revolvers are used as evidence and they are ordered confiscated by the court, they should be turned over to the city custodian for disposal in accordance with the provisions of the city code.

The court in ordering revolvers confiscated has no power to turn the revolvers over to clerks, bailiffs, or police officers for confiscation.

We believe that if this matter is brought to the attention of the chief justice of the Municipal Court, he will take it up at the next meeting of the judges and see that the provisions of the city code are complied with, in respect to the city custodian receiving confiscated revolvers. Therefore, we are of the opinion, that the city custodian should make demand upon the clerks, bailiffs or police officers holding the guns for confiscation, and if the guns are not turned over to him he should bring a replevin suit to obtain possession of the revolvers.

Yours very truly,
 BERTHOLD A. CRONSON,
Assistant Corporation Counsel.

Approved:
 EDWARD J. SMEJKAL,
Acting Corporation Counsel.

Appropriation for Street Repair Work.

Chicago, August 27, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter relating to the inquiry of the Bureau of Streets about the right to proceed on certain repairs of water-bound macadam streets was referred to the writer for consideration and reply.

The question asked us arises out of the peculiar way in which the appropriation for street repairs was made. The City Council appropriated the sum of \$821,520 for ward service from the Vehicle Tax Fund, but provided that \$750,000 of this sum should not be expended "except upon the specific order of the City Council hereafter to be made." (Council Journal, June 30, 1919, p. 646.) This left the commissioner of public works without authority to spend money for this purpose after he had exhausted the difference between the two amounts above mentioned, and this we are told has been spent.

On July 21st the City Council undertook to make provision for the prosecution of the work during the period expiring with the next regular meeting of the City Council by the passage of the following ordinance:

"BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

"SECTION 1. That the commissioner of public works be and he is hereby authorized, during the period of adjournment of the City Council, to issue, at his discretion, all necessary permits; and that ordinances requiring special orders of the City Council for the performance of vehicle tax work, be satisfied by the submission by the commissioner of public works, at the first meeting of the City Council after such adjournment, of a statement of all such permits issued pending Council action, and of all work done and expenditures made on such work requiring specific order of the City Council, except that all orders for work on water-bound macadam streets shall be referred to the Committee on Finance.

"SECTION 2. This ordinance shall be in full force and effect from and after its passage."

We will not undertake an analysis of the above ordinance. It is vague and indefinite, unintelligible to any one who has not the key to the intention of the City Council, subject to a variety of constructions, conflicts with numerous ordinances now in effect, and is altogether so ambiguous with reference to the meaning of the words "permits," "orders," etc., that it is doubtful whether on a test it would be interpreted as meaning anything in particular.

It will suffice for the purposes of this opinion to assume that it was the intention of the City Council that the commissioner of public works should have authority to use such part of the \$750,000 as he deems necessary pending the recess of the City Council except that he is to refer the question of work on water-bound macadam streets to the Committee on Finance.

It appears that strong pressure is now being exerted to have some re-surfacing of water-bound macadam streets done in the northwestern part of the city, and that in your opinion the work ought to be done, but you are not certain whether you have the authority to do it on account of the last clause of Section 1, which makes an exception of that kind of work. You, therefore, ask whether the clause "except that all orders for work on water-bound macadam streets shall be referred to the Committee on Finance" is valid.

The Law Department has uniformly held that the Committee on Finance is not charged with and cannot exercise executive functions, nor is it lawful for the City Council to delegate legislative power to this committee. The clause in question is obviously intended to do either one or the other of these things, and in so far as it attempts to do either it is invalid.

To be more specific, if it was the intention to make it incumbent on the commissioner of public works to look to the Committee on Finance for directions in the exercise of his discretion, the clause would have to be construed as an invalid usurpation of executive functions; while if it was the intention to place in the hands of the Committee on Finance the authority to release portions of the appropriation as it saw fit, that would amount to a delegation of legislative power.

There is considerable doubt whether the ordinance quoted above, from a technical standpoint and from the standpoint of accurate legal phraseology, is sufficient to cut the strings which bind the \$750,000 in the appropriation. But since that appears to have been the object in view, and since there has been a practical construction of same to that effect, we believe it will be safe to continue on that theory. On the other hand, the appropriation being released, it is manifestly improper to attempt an exception of this kind.

We are therefore of the opinion that you have the legal right to ignore the clause about which you inquire.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

EDWARD J. SMEJKAL,
Acting Corporation Counsel.

Approval of Plans for Buildings.

September 15, 1919.

HON. CHARLES BOSTROM, Commissioner of Buildings.

Dear Sir:

Replying to your communication of September 4, we beg leave to advise you that Section 232 of The Chicago Code of 1911, as amended February 4, 1918, which amendment appears on page 2022 of the Journal of the Proceedings of the City Council of February 4, 1918, provides that all plans and drawings for buildings or for structures other than buildings shall be presented to the commissioner of buildings for his approval, and each set of plans shall be approved by the commissioner of buildings before a permit will be granted, and that no permit shall be granted or plans approved unless such plans are signed and sealed either by a licensed architect or by a licensed structural engineer.

Section 1 of an act to revise the law in relation to the regulation of structural engineering, approved June 24, 1919, and in force July 1, 1919, provides that it shall be unlawful

for any person to practice or to attempt to practice structural engineering without a certificate of registration as a registered structural engineer issued by the department of registration and education.

It also further provides that it shall be lawful for a corporation to prepare drawings, plans and specifications for buildings and structures as defined in Section 2 of said act which are constructed, erected, built or their structure supervised by the corporation if the chief executive officer or managing agent of the corporation in this state is a registered structural engineer.

Section 1 of said act also provides that one or more registered structural engineers may lawfully enter into partnership with one or more registered architects.

Section 2 of said act provides as follows:

“A person shall be regarded as practicing structural engineering within the meaning of this act who is engaged in the designing or supervising of the construction, enlargement or alteration of structures, or any part thereof, for others, to be constructed by persons other than himself. Structures within the meaning of this act are all structures having as essential features foundations, columns, girders, trusses, arches and beams, with or without other parts, and in which safe design and construction require that loads and stresses must be computed and the size and strength of parts determined by mathematical calculations based upon scientific principles and engineering data. A person shall also be regarded as practising structural engineering within the meaning of this act who is engaged as a principal in the designing and supervision of the construction of structures or of the structural part of edifices designed solely for the generation of electricity; or for the hoisting, cleaning, sizing or storing of coal, cement, sand, grain, gravel or similar materials; elevators; manufacturing plants; docks; bridges; blast furnaces; rolling mills; gas producers and reservoirs; smelters; dams; reservoirs; waterworks; sanitary works as applied to the purification of water; plants for waste and sewage disposal; round houses for locomotives; railroad shops; pumping or power stations for drainage districts; or power houses, even though such structures may come within the definition of ‘buildings’

as defined in any act in force in this state relating to the regulation of the practice of architecture.”

It is our opinion that it is your duty to approve plans and issue permits for the erection of buildings or other structures when the same are signed and sealed by registered structural engineers.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Federal Tax on Motor.

September 6, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

Your letter relating to the purchase of a motor truck by the Bureau of Parks, Public Play Grounds and Bathing Beaches, to which were attached a number of letters from the General Motors Truck Company, was referred to the writer for consideration and reply.

It appears that this truck was bought last May, that a war tax of \$91.50 was due on same from the manufacturer to the government, and that this sum was not included in the contract price, but that a claim is now being made for the money on the theory that the city owes it to the contractor.

We are not sufficiently advised as to the nature of the contract with this company to say whether or not the city is liable for the tax. We judge from the letter attached to your communication under date of August 11, 1919, that a contract price was agreed upon without reference to the manufacturer's tax and that the claim was made for same only after the manufacturer discovered that it had failed to include it in its estimate. If that is the case, it is doubtful whether they have the right at the present time to make claim for this money. If, on the other hand, the truck was

sold to the city with the understanding that the city would pay the tax in case the Federal authorities should rule that it must be paid, the company is entitled to the money under the ruling of the Department of Internal Revenue and the opinion we rendered on same to the comptroller under date of September 3, 1919.

For your information we attach a copy of our letter to the comptroller, from which you will see that we recommend that the tax be paid, but that the bill for same should be made as a separate item on each purchase.

We return herewith correspondence from General Motors Truck Company which belongs in your file.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Proposed Zoning Measures.

September 18, 1919.

HON. JOSEPH O. KOSTNER, Chairman, Committee on Buildings and City Hall.

Dear Sir:

Pursuant to the direction of the corporation counsel, the undersigned made a trip to New York to investigate and study zoning conditions and the practical working of the zoning laws in force there, for the purpose of aiding your committee in its work of preparing ordinances designed to put the recently enacted Illinois Zoning Law into effect in this city. We deem it proper to make this report directly to you as chairman of the committee, since we have been assigned to work with your committee in getting a districting ordinance under way.

It is a matter of keen regret that our investigation was made after the passage of the Illinois Zoning Law instead of before, because it contains two cumbersome features that

would probably have been avoided in case we had been in a position to advise the members of the General Assembly when the bill was up for passage. These features are the provision for notice and the provision for majority control, concerning both of which we will speak at greater length later on.

Through the courtesy of Mr. Herbert S. Swan, who was the executive secretary of the Zoning Committee of New York and who is now engaged in the work of preparing a zoning ordinance for the City of Newark, New Jersey, we were afforded an opportunity of examining into the actual work of preparing a districting ordinance. Our investigation brought to light many difficulties that we will have to contend with which were entirely absent in both of the places mentioned. On the other hand, we find that there is in the City of Chicago on the whole less encroachment on residential districts of objectionable structures than in either of those cities, and, if properly handled, the zoning laws to be passed here will have the effect of creating a more beautiful city than is possible in those places.

The Zoning Resolution of New York was passed on July 25, 1916, by the Board of Estimate and Apportionment. It consists of a series of regulations and a set of maps marking out "Use Districts," "Height Districts" and "Area Districts." On the "Use Map" are indicated the limits of districts designed for particular uses, which are classified as residential, business and unrestricted.

The New York resolution is a comprehensive Zoning or Districting Law, which includes the feature of an appeal to a Board of Standards and Appeals in all cases where a departure from the strict letter of the law is asked. It was stated, both by parties who had to do with framing the law and the parties who are now administering it, that this means of securing a modification of otherwise rigid regulations is the thing which makes the whole plan workable. Whether or not a similar provision will stand if incorporated in an ordinance for this city can only be determined when a test is made.

The New York courts have always been more indulgent in the matter of discretion on the part of the superintendent of buildings and what may be called discrimination in the matter of building than our own courts. This fact, and the fact that public sentiment had ripened on the subject more than here, made the work in New York less difficult than ours will be.

The enabling legislation under which the New York Zoning Resolution was passed became effective in 1914. Public sentiment was very strongly in favor of such legislation. While sentiment in Chicago is growing, it has up to the present time taken the form of protest against the invasion of residential districts by factories and other business structures. In New York there was quite a different feeling. There had been an invasion of the commercial districts of the highest class by sweat shops and factories to such an extent that there was great fear of destroying the best commercial districts of the city. Buildings were pointed out to us in the neighborhood of Madison Square, whose taxable value had fallen a million dollars or more, and the former retail shopping district near 23rd street, Broadway, Fifth and Sixth avenues was entirely wiped out by this invasion. Hence, a feeling of apprehension and the desire to "save New York" prevailed among all classes. It is true that there are a large number of people who own homes in Chicago who favor districting or zoning, in which respect we have an advantage which will ultimately be of great value in molding public opinion, but on the whole sentiment is only beginning to take shape. Our business men have not yet awakened to the need of the kind of ordinance that will protect business districts, and our manufacturers look upon our zoning law with a great deal of distrust.

Our law was framed on the theory that there were districts which could be saved, and that these districts should be carved out piecemeal and restrictions should be imposed on them in such a way that they would be permanently relieved from the encroachment of objectionable structures. The feeling seemed to prevail that so far as districts that were

invaded were concerned little or nothing could be done for them. Under the laws now operating in New York, St. Louis and other cities a different plan was adopted, the whole city being districted by one ordinance. By this means it is hoped to reclaim districts that are in a state of decadence.

In order to accomplish anything without serious delay under our law, it will be necessary to frame ordinances covering districts of comparatively small area, but we believe it would be well to do this in such a way that when a comprehensive ordinance has been worked out these small districts should fit into the complete plan.

We feel convinced that a comprehensive zoning ordinance which will include the whole city will ultimately be preferable to the creation of small districts in different parts of the city. There are several reasons for this. First, it will be easier to secure favorable court action where it can be shown that there has been ample provision made for every class of use of the property within the city, and there is less danger of an ordinance being held discriminatory. This in itself is a sufficient argument in favor of such a comprehensive ordinance. Next, the establishment of districts which have the effect of protecting only particular neighborhoods will have the result of causing people who have been thus protected to lose interest in any further districting, thereby causing the work to lapse. Again, the creation of districts here and there will deprive the city of the uniformity of design which has been found very desirable. And, finally, large areas which are now in process of degeneration can be saved by a comprehensive plan of districting where otherwise they would lapse into conditions that would make them hopeless. Thus, while we favor immediate action in such limited districts as can be created at present, we believe it would be wise to begin preparations at once for a comprehensive plan embracing the whole city.

Our Zoning Law requires notice of a public hearing to be given to each property owner individually, and requires publication of a notice giving streets and house numbers affected and the legal description of the property within a

proposed district. This notice provision is exceedingly cumbersome, and will be found a serious handicap in the proposed work. It was inserted because the Council Committee having the matter in charge first prepared a bill contemplating the formation of districts in the same manner that local improvements are now made. While this plan was abandoned, the notice requirement was looked upon as good and calculated to make the passage of the bill more certain, and therefore retained.

Owing to the fact that our law requires such individual notice to each property owner, it will be difficult to accomplish the work of comprehensive zoning until this feature of the law has been eliminated. We recommend, however, that the work proceed along such lines as are possible, and that we do what we can under the present law, in the hope that before a complete plan can be worked out we will be able to secure the necessary amendments to our Zoning Act.

It took the Zoning Committee two years to make the necessary surveys and draft a comprehensive zoning law in New York for a district comprising 325 square miles.

Incidentally, it may be noted that it was found necessary there to secure an amendment of their enabling legislation before they could finish their work. It may be safe to say that such a piece of work for approximately 200 square miles in the City of Chicago will take at least a year and a half. Consequently, if a competent staff were selected at once and it went to work on such a comprehensive districting ordinance, before its work was complete we would be in the midst of a regular session of the General Assembly and any amendment necessary to overcome the difficulty of individual notice could be made. If the Legislature should fail to change this provision it would be necessary to continue to go to the great expense of sending out the individual notices and the publication of the street and house numbers and the legal description of all the property in the city—an utterly useless expense. Zoning can only be accomplished under the police powers, and in the exercise of this power individual notice should not be required.

In discussing our Zoning Law with various members of the Zoning Committee and the Law Department of New York, the provision in regard to the power of a majority of property owners in any district to prevent the formation of a district was looked upon by them as unfortunate. It was their opinion that this provision would result in interfering with the formation of any large district. We explained to them that it was necessary to insert such a provision in our law in order to secure its passage, and whether it will have the effect of preventing the passage of a comprehensive zoning ordinance remains to be seen.

We had an excellent opportunity of seeing just how this work was done in New York, because Mr. Swan, who assisted in the work in that city, is now engaged in the actual work of districting Newark, and he showed us the methods he employs. The work in Newark has progressed so far that it was like unfolding the whole plan to give us this look into the system. The Newark work is especially instructive on account of the fact that they will there have districts which will include industries that are in their nature nuisances from which residences will be excluded—a feature of the plan that warrants attention as being adaptable to certain districts in Chicago.

At Newark the staff is now at work on a series of what were originally large skeleton maps. There are about 15 of these, and most of them have so far progressed that they form a complete visual index of the whole city as to each of the subjects that is portrayed therein. This constitutes the main work of the comprehensive survey that is absolutely essential in order that a proper zoning ordinance may be drafted.

One of these maps shows the uses to which every piece of property in the city is put, whether residential, business, industrial or a nuisance. Another shows the density of population. Still another the height of buildings. Thus, each map shows at a glance what the conditions are in any spot with respect to use, height, population, industrial activity, width of streets, building lines, fire hazard, character of structures, intensity of building, etc., as the case may be.

It is the intention of Mr. Swan and his staff to draft the ordinance after this survey is complete in such a way that the use to which any particular piece of property is at present put will not be interfered with, but so that no future objectionable invasion will be lawful.

We were taken around the City of Newark in order that we could see how this proposed ordinance was to apply. It was instructive to note how the effort is being made to save from industrial and business encroachment residential districts where more or less business buildings had been located in every block. This is deemed absolutely essential there, because unless these residential districts are preserved the entire working population in the industrial districts will have to travel long distances to go to work. The theory under which they are working is that by putting a stop to further encroachment there will be stability so far as what is left is concerned and there will be a gradual effacement in time of those structures that have no place there.

As stated above, the New York Zoning Resolution has attached to it three maps showing Use Districts, Height Districts and Area Districts. These districts are indicated on the maps by streets, the law providing that whatever is indicated by the map as showing the character of the street shall be applicable to both sides of the street or to the side of the street indicated as the case may be.

This method of designating districts is different from that used in St. Louis, where the areas themselves are indicated in full on the maps instead of by marking the streets running through them. It may be that this plan is better suited for Chicago, where generally speaking the distances between streets and the depth of lots is greater than in New York.

The New York Resolution provides in a very ingenious way for height regulation. Under a system of regulating according to the width of the streets in the various districts, and the prescribing of maximum and minimum widths to be attributed to streets, provision is made for tall structures where they are required even though the streets are narrow,

while in other sections where the tall buildings are not required the height restriction applies without maximum or minimum width regulation. It is also made possible to build to an indefinite height where the occupied portion of the lot area is reduced either from the ground up or at the height limit. This feature of the New York law may be valuable to us, although there would have to be some modification in order to make it adaptable to conditions in Chicago.

With regard to the provisions for intensity of use of lot areas, there may be no immediate necessity for districting, since the present requirements as set forth in our ordinances seem to be ample. This is a matter, however, concerning which your committee may be more fully advised by the commissioner of buildings and the commissioner of health.

We were enabled to get an inside view of the practical work of the Board of Standards and Appeals. The corporation counsel, Wm. P. Burr, the acting corporation counsel, Geo. P. Nicholson, and others in the Law Department assisted us in our investigation, and we are indebted to Mr. John P. Leo, the chairman of the board, for much interesting information concerning the manner in which the petitions are heard.

The procedure in all cases is based on the refusal of the superintendent of buildings to grant a permit. A permit is always denied when the strict letter of the law is not lived up to. Then a petition may be filed by the party seeking a permit and a hearing is had on it after notice to property owners affected. The power of the board in such a case is construed as very broad under the following language:

“Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and justice done.”

In pursuance of this power the board imposes such conditions as it sees fit if it authorizes a permit. The character of these conditions very often has no relation to the use of

the building or the exercise of the power to conserve the public health, comfort or safety. In many cases they are aesthetic in their nature. The board goes so far sometimes as to require an ornamental front or architectural feature of some kind as a condition of a garage or other prohibited structure being located at a certain place. We were given to understand that cases involving the right of the board to impose conditions of this kind had come up in court, but that the party aggrieved had usually lost because he had no right in the face of the adverse requirement that he was trying to overcome. On the other hand, the objectors were usually satisfied in this way. In any event, there has not been any court decision up to the present time which has interfered with the disposition of petitions in the manner indicated. It is doubtful whether we would be so fortunate in this state if a similar procedure was instituted here, especially in view of the fact that the tendency of our courts has always been to hold the whole ordinance bad whenever there was a provision in it which would make a discrimination possible.

We found from our investigations that in some respects the City of Chicago is more fortunate than New York. We have much less in the way of encroachment of objectionable structures in either residential or commercial districts, taking the city as a whole, and, so far as nuisances are concerned, our frontage consent provisions have resulted in giving us an appreciably better condition to work up from than either New York or Newark.

The part of our zoning law which gives the majority of the owners of property in a district the right to prevent the creation of a district or an addition thereto was inserted at the behest of the opponents of the measure when it was pending before the Legislature. Much can be said to the effect that it is a bad feature of the law, but since it was deemed essential to put this in for the purpose of getting the bill through, it is idle to discuss the subject.

As a result of our investigations we have concluded to recommend the passage of two separate ordinances. One of

these should be directed to the purpose of securing a working method for creating districts of limited size which can be created at once without making an elaborate survey. The other ordinance should be one which makes suitable provision for a commission to take up the work of preparing a comprehensive zoning ordinance covering the whole city, to be put into effect when the present statute is amended so as to do away with the individual notice requirement.

If these recommendations meet with the approval of your committee we will at once prepare and submit for your consideration tentative drafts of two ordinances covering our suggestions.

For the purposes of the first ordinance we recommend that a board to be known as the City Districting Board should handle the work. In our opinion this board should consist of five members. The three departments having most to do with the enforcement of the building ordinances, the body having to do with the character of local improvements to be made in the various districts, and the City Council, should all be represented thereon. That is to say, we believe this board ought to be made up of the commissioner of buildings, commissioner of health, corporation counsel, president of the Board of Local Improvements and the chairman of the Committee on Buildings and City Hall. We suggest that the commissioner of buildings should be made the chairman and that the president of the Board of Local Improvements should be designated as the officer who sends out the notices for public hearings, makes the necessary affidavit of notice, etc.

In this way, when a district is proposed every requirement as to building, health, legality of proposed requirements, and public improvements to be made therein, can be taken care of, and the chairman of the Building Committee would be in a position to present the matter fully and intelligently to the City Council when the work was completed.

For the purposes of the working out of a comprehensive zoning law covering the whole city we suggest that a commission of fifteen be appointed, on which there should be representation from architects, engineers, builders, lawyers, real

estate board, manufacturers, merchants, Chicago Plan Commission, park boards, Sanitary District of Chicago, and the large financial interests of the city. An adequate appropriation should be given to them to employ a staff that is large enough to do the work expeditiously. There is at present an appropriation which could be drawn on for the remainder of the fiscal year, but a much larger amount will be required next year.

As soon as the ordinance providing for a working method of creating districts of limited size is passed, new ordinances providing for the creation of the districts themselves could be introduced, public hearings could be had, and the districts could be established.

We await your further pleasure in this matter.

Respectfully submitted,

LEON HORNSTEIN,

EUGENE H. DUPEE,

Assistant Corporation Counsel.

Approved: .

SAMUEL A. ETTELSON,

Corporation Counsel.

Approval of Plat of Subdivision.

September 24, 1919.

HON. JOHN D. RILEY, Superintendent of Maps.

Dear Sir:

We are in receipt of your communication of September 19, with attached plat of Mabelle Rogers Blakely's Birchwood Beach Park Subdivision. You ask to be advised if it is necessary to approve this plat of subdivision.

The plat presented appears to have been made by commissioners in a certain proceeding in the Circuit Court of Cook County for the partition of land. The decree entered by the Circuit Court (a copy of which is presented with your communication) recites:

"That the map or plat of a subdivision made by said commissioners, attached to said report and made a part thereof be, and the same is hereby approved and

the clerk of this court is hereby directed to cause said map or plat to be recorded in the recorder's office of Cook County."

Chapter 109, Par. 11, §1 of Hurd's Revised Statutes of 1917, p. 2227, "An Act to authorize courts of record, in certain cases, to order lands to be subdivided and platted (Approved March 18, 1874, in force July 1, 1874)," provides as follows:

"PLATS IN PROCEEDINGS IN COURT.) §1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That in any proceeding in any court of record in this state, by executors or administrators, for the sale of lands of deceased persons, or by guardians, for the sale of lands of their wards, or for partition of lands, when such lands are to be sold in parcels, or actual partition thereof shall be made, it shall be competent for the court to order such executor or administrator, guardian, master in chancery, special commissioner, or other officer or person authorized to sell the lands in question in any such proceeding, or commissioners authorized to make partition of such lands, to cause such lands to be surveyed and subdivided, and a map or plat of the same to be made, showing the lots or parcels of such subdivision or partition designated by numbers or letters; which map or plat shall be acknowledged by the person or persons so causing the same to be made, in like manner as is now required by law in cases of plats or maps made by owners of lands, and shall, in like manner, be certified by the surveyor or engineer making the same; which certificate shall contain among other things, an accurate and definite description of the lands so subdivided or partitioned; and such map or plat shall be submitted to the court for his approval, and if approved by the court, shall be recorded in the recorder's office of the county or counties in which the lands in question in any such proceeding, are situate."

Chapter 24, Article X, Par. 173, §5 of the Cities and Villages Act (Hurd's Revised Statutes, 1917, p. 337), provides as follows:

"MAPS—APPROVAL OF.) §5. The city council or board of trustees shall have power to provide, by ordinance, that any map, plat, or subdivision of any block, lot, sub-lot, or part thereof, or of any piece or parcel of land, shall be submitted to the city council or board

of trustees, or to some officer to be designated by such council or board of trustees, for their or his approval; and in such cases no such map, plat or subdivision shall be entitled to record in the proper county, or have any validity until it shall have been so approved. (See 'Recorders,' ch. 115, §13.)"

Chapter 115, Par. 13, §13 of Hurd's Revised Statutes, 1917, p. 2397, provides as follows:

"MAPS—PENALTY.) §13. It shall be unlawful for any recorder to record any map, plat or subdivision of land situated in any incorporated city, town or village, until the same shall have been approved by the legislative authority of the city, town or village in which such land may be situated, or by some city, town or village officer for that purpose to be designated by resolution or ordinance of said legislative authority. For each and every violation of this section by any recorder or his deputy or employe, such recorder shall forfeit and pay to the county the sum of \$200, to be recovered in any court of competent jurisdiction, in the name of the state, for the use of the county, in an action of debt, with costs of suit. (See 'Cities,' etc., ch. 24, §173.)"

Section 2095 of The Chicago Code of 1911, p. 660, describes the duties of the examiner of subdivisions as follows:

"2095. DUTIES—PLATS.) He shall be *ex officio* examiner of subdivision, and it shall be his duty to examine any map, plat or subdivision of any block, lot, sub-lot or part thereof, or of any piece or parcel of land, situated within the City of Chicago, presented or submitted to him for approval, and if he approve of the same, he shall so certify."

It is clear from an examination of the foregoing statutes that the Legislature intended that any subdivisions or plat of land lying within the limits of organized cities and villages should first be approved by the proper corporate authorities before being permitted to be recorded. It seems hardly necessary to make mention of the fact that in order to insure a reasonable uniformity in streets and alleys, etc., such requirement is absolutely imperative and applies, in our judgment, as well to subdivisions made by courts as by individuals. We find nothing in the section of the statute relat-

ing to "Plats in proceedings in court" which obviate the necessity for securing the approval of such proper corporate authorities.

By ordinance of the City of Chicago the superintendent of maps is designated as the official to pass upon such plats.

We are, therefore, of the opinion that the plat in question purporting to be a part of Circuit Court decree No. B20206 must have your approval before the same can be recorded.

Respectfully submitted,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Legal Effect of Declaration of Trust.

September 26, 1919.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

In response to your request for information concerning the duties and liabilities you would assume in case you were made a trustee of the American Zoological Park Association, we submit the following:

The trustees of this organization will be in the same position as the directors of a corporation for profit organized under the laws of the state except in so far as they have expressly disavowed liability in the Declaration of Trust which has been submitted to us for examination.

The Declaration of Trust is similar in character to many others that are recorded from time to time for the purpose of creating organizations that do business practically the same as stock companies, but which are not bound down to the same strict procedure and limitations that the law now imposes on such companies. In other words, it creates what may be called a common law corporation.

There is nothing in the Declaration of Trust which indicates clearly what the business of the association will be. The purpose of the organization is stated to be the advan-

tageous use of uncleared cut over timber lands and the propagation and conservation of wild animals thereon for food, fur and educational purposes. It may not be intended as a money making enterprise. At the same time, by provisions showing that it is the intention to buy and sell, and by words that speak of net income, dividends, etc., it is apparent that there is some intention to conduct a regular business and to pay dividends to the shareholders of said association.

At the very outset the Declaration of Trust states that the trustees and their successors shall hold all the funds and property and manage the business of the association for the benefit of the shareholders, but that neither the trustees nor the shareholders shall ever be personally liable for the debts of the organization as partners, that the trustees shall be liable for debts only to the extent of the trust fund, and that shareholders shall not be liable on any contracts or instruments creating liability. This puts the responsibility of managing the business on the trustees, and while there is apparently no pecuniary liability assumed, it may develop into such a liability if the affairs of the organization are mismanaged, in spite of the attempt to guard against such a contingency.

A common law trust is very often a desirable method of conducting a business which has no ulterior purpose in view except the handling of something for the benefit of the public or the shareholders from which no profit is expected. If that is the only purpose it is somewhat similar to corporations not for pecuniary profit. But when such an organization is created which has for its avowed object the handling of property in such a way that dividends may accrue to the shareholders, it is not only open to the objection that it seeks to avoid the restrictions and limitations which are placed on regular corporations for profit by the laws of the state, but it is exceedingly doubtful whether the trustees are released from the obligations that the law imposes on directors of a corporation for profit.

It may be set down as certain that where the laws of the state prescribe the method by which a corporation for profit

may be created and operated, the courts will not permit the officers of an organization to evade responsibility by simply calling it something else or by establishing their own law through a declaration of trust. Hence, it is our opinion that in case there is reason for calling the trustees to account at any time it will be found that their liability is substantially the same as the liability of directors of a corporation under similar circumstances.

It is provided in the Declaration of Trust that the trustees may resign as a body by means of a written instrument duly filed and entered upon their records, and by a like document they may appoint their successors to carry out and perform the purposes of the trust. There is also provision for any individual trustee resigning and for the filling of such vacancy by the remaining trustees. No provision whatever is made for the selection of trustees by the shareholders. Thus, there will be no power in the hands of the shareholders at any time to control their own property in case a trustee or the entire Board of Trustees are unsatisfactory to them.

Under Article XI, it is stated that the trustees shall be responsible only for their wilful or corrupt breach of trust, and not for any error of judgment, and that they shall not be responsible for the act, omission or default of any agent if they used reasonable care in the selection of such agent. This, of course, leaves open the question as to whether or not some omission of duty or error of judgment was a wilful or corrupt breach of trust, and it puts in question whether or not reasonable care was used in the selection of an agent in case an agent goes wrong.

While this may appear to be rather a remote possibility, nevertheless, where the shareholders of an organization are so completely segregated from the management as they are under this Declaration of Trust, it is not unlikely that at some time in the future demands will be made to secure control of the organization by alleging a breach of trust or negligence in the appointment of an agent, in order that court action may be predicated thereon which will ultimately end in a receivership or other court control.

The control of the directorate is not the only thing that

the shareholders are deprived of by this Declaration of Trust. If we were to place ourselves in the position of a shareholder we could find many things besides the absolute surrender of all control over the selection of trustees and the absolute waiver of all voice in the management of the business that appear objectionable in this Declaration of Trust. We point out a few of these things, as follows:

The trustees have the right to contract with themselves (Art. V-b); to loan money to anyone they choose (Art. V-f); to borrow money without accountability to the shareholders as to whether it is for the purposes of the trust (Art. V-g); to acquire real estate without such accountability (Art. V-h); to acquire stocks, bonds, etc., without such accountability (Art. V-i); to declare dividends only when they see fit (Art. V-k); to sell the whole of the trust property when they see fit (Art. XIII); and finally, the owner of shares has no right to any share in the trust property, nor right to call for a partition of same, nor right to institute a suit thereon.

In short, the shareholders, no matter what their interest is, have no right to name the trustees, or to control the management of the property, the distribution of surplus funds or the policy of the association in general.

We assume from the nature of this organization that it is intended to be more or less of a public body, and that the shareholders will probably not expect any returns on their investment. If they did, the form of organization would be highly objectionable, because the trustees (if the Declaration of Trust stands) are not only vested with practically absolute power and are under no form of control by the shareholders, but the shareholders seem to be cut off from asserting any rights either through court proceedings or otherwise.

From the above you will see that many objections can be urged against this form of an organization both from the standpoint of the trustee and from the standpoint of the shareholder.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Frontage Consents for Undertaking Establishment.

October 1, 1919.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

We are in receipt of your communication of September 17th, bearing upon the application of Mr. Frank Majoreczyk for a permit to operate an undertaking establishment at 2711 E. 84th street, and wherein you state that the lot fronts on Marquette avenue, but that the entrance to the building is on 84th street. Attached to your letter are the petitions of residents giving consent; verification report of Mr. Collins, who investigated and verified the genuineness of the signatures on the petitions, and also blue print, all of which documents we return herewith.

Applications for permit to conduct an undertaking establishment are governed by the provisions of Section 1238 of The Chicago Code of 1911, as amended November 4, 1912, on page 2193 of the Council Proceedings, which ordinance is as follows:

“It shall be unlawful for any person to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, who, in connection with such business receives at his place of business the body of any dead person for embalming or other purposes, on or along any boulevard or pleasure driveway, without the written consent of a majority of the property owners according to the frontage on both sides of such boulevard or pleasure driveway in the block in which such morgue or place of business is located; it shall also be unlawful for any person to establish or maintain a morgue or to carry on the business of an undertaker as defined in this article, who, in connection with such business receives at his place of business the body of any dead person for embalming or other purposes, on or along any street in any block in which two-thirds of the buildings on both sides of the street are used exclusively for residence purposes without the written consent of a majority of the property owners according to the frontage on both sides of such street in such block, provided that nothing herein contained shall apply to persons licensed as undertakers at the time of the passage of this ordinance.

“Said frontage consents shall be obtained and filed with the Department of Health before a license shall issue for such business.”

The frontage consents attached to petitioner's application are for the property at 2711 E. 84th street, which is between Manistee and Marquette avenues.

While the lot fronts on Marquette avenue the building intended to be used for the undertaking establishment in question covers but a small portion of the rear of said lot and fronts on 84th street as stated. We interpret the ordinance governing frontage consent to mean frontage of the building, not frontage of the lot upon which the building is situated.

Your investigator, Mr. Collins, states in his report that 850 feet out of 1250 feet contained in the block are represented on the petition and that the signatures are genuine.

Thus, from the data before us, we are of the opinion that the application of Mr. Frank Majorezyk complies with all the legal requirements and that he is entitled to a permit to operate an undertaking establishment at 2711 E. 84th street.

Respectfully submitted,

ALFRED O. ERICKSON,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Daylight Saving.

October 2, 1919.

HON. WILLIAM HALE THOMPSON, Mayor.

Dear Sir:

At your direction the matter of providing for daylight saving was discussed with Messrs. Elmer T. Stevens and Jay C. McCord, who represent the Chicago Association of Commerce.

We are informed by these gentlemen that this association is making an effort to secure for the City of Chicago a continuation of the system of daylight saving which was in

effect last year and this year, but which by a recent congressional enactment has been abrogated.

There are three methods proposed for effecting this object. One of these contemplates an agitation and an educational campaign by which the people generally should agree voluntarily to open their stores, factories and offices an hour earlier and close them earlier. It is assumed that the public officials, if such an agitation is started, will assist by establishing correspondingly advanced hours opening municipal offices, courts, schools, etc. Under this plan there would be no change in time or setting forward of clocks.

A second plan proposed has for its purpose a change in the dividing line between Eastern and Central time. It is suggested that the line be established along the Mississippi River so that all territory lying east of that would have the same time as New York City.

In discussing this plan the parties referred to indicated that they thought it was almost useless to expect such general action by the people or the Legislatures of the states affected as would be necessary to accomplish it.

The third plan proposed was to follow the precedent of certain cities along the border line at present established between Eastern and Central time, and to provide by ordinance for the establishment of time for all municipal and public purposes on the basis of Eastern time.

The last plan was considered by far the most practical and feasible, and it was more particularly for the purpose of explaining and recommending this last plan that the matter was brought before you.

It is, of course, understood by all that the city as a municipality has no power or authority to regulate the time at which the activities of its inhabitants begin or end. There are some things, however, which the city as a municipality may do which will tend to establish a working day different from that which would be the vogue after the discontinuance of the present daylight saving law. That is to say, the City Council could establish the hours at which all official municipal activities should begin and end and establish a rule

with regard to what time should be construed as within the meaning of a requirement of any ordinance or order of the City Council providing for the doing of a thing at a certain hour.

We believe that the three cities Detroit, Cleveland and Columbus have gone as far as it is possible to go along this line. We have before us the ordinances passed in those cities. They are all practically to the same effect. They establish the standard of time throughout the city as of the Seventy-fifth Meridian of Longitude West from Greenwich, known as Eastern Standard Time, and require municipal offices and legal and official proceedings of the city to be regulated thereby; further, that when by ordinance, resolution or action of any municipal officer or body an act must be performed at or within a prescribed time, it is to be performed according to such standard of time. The ordinance further provides that when a clock or other time piece is in or upon a public building maintained at the expense of the city, the board, commission, officer or other person having control and charge of such building shall have such clock or other time piece set and run according to the standard of time thus established.

In the City of Detroit there was a referendum on the question of establishing either Eastern or Central time on August 29, 1916. It should be borne in mind that this referendum was had long before the federal daylight saving law went into effect, and that the voters at the time had no experience with daylight saving to guide them. The vote was 32,613 in favor of Eastern Standard Time against 16,252 for Central Standard Time.

Among the other things discussed was whether it would be advisable and practical to have a referendum on the question in this city. It was assumed that a movement for establishing a daylight saving schedule throughout the year would not be popular, and that in fact is one of the chief objections to the permanent establishment of Eastern time for this territory. Hence, it was suggested that if the question was to be put to popular vote there should be a vote

on a question defining exactly what period of the year the daylight saving schedule should be effective. It was further suggested that the time that such schedule was effective in 1918 and 1919 was as good a period as could be established.

The question of how the matter could be brought before the voters was also discussed, and the gentlemen above referred to were told that the writer would examine the law with reference to what could be done along this line and report to the mayor.

We find that practically the only way in which a referendum could be had is under the statute relating to questions of public policy (Hurd's 1917 Statutes, page 1358). This law requires a written petition signed by twenty-five per cent of the registered voters. It also requires that the petition should be filed with the proper election officers not less than sixty days before the date of the election at which it is to be submitted to the voters. We believe a question could be framed which would present to the voters a question of public policy that would come within the spirit and intent of this law.

The gentlemen referred to seem to think that it would be desirable to have a vote at the forthcoming November election, on the ground that the question is now fresh in the minds of the people and they have the benefit of their experience with daylight saving to serve as a stimulus and to arouse interest. It was, therefore, suggested that if it was possible, it would be desirable to have an ordinance passed that should take effect only after a referendum thereon, and that such ordinance could be presented at the November election. We find, however, that it would not be lawful to present the question in this way. The provisions made in the statutes for submitting ordinances for referendum, such as that contained in the Mueller Law relating to street railways, are only four in number. While there is no prohibition in the statute against submitting other ordinances to a referendum, such procedure might be construed as a delegation of power on the part of the City Council. Therefore, it would seem that such an ordinance, if submitted, would have to be submitted under the public policy question statute.

It was requested of us that we lay before you the different plans and the legal phases of the situation in order that you may take such action as you see fit after being fully advised thereon, and it is for this reason that we have presented the matter at such length.

Yours very truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Redemption from Foreclosure on Property Forfeited for Taxes.

October 9, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

You submitted to us a list of properties on which the city holds tax deeds which are involved in the tax foreclosure case in the Circuit Court docketed as No. B.-7351.

The sale under this foreclosure suit was held on October 14, 1917, and the time for redemption will expire on October 14, 1919. The claims of the city on the parcels listed amount to \$1,851.55. The cost of redemption as estimated by the county clerk is \$624.66.

You state that before you adopt a policy with regard to making redemption you would like to be advised as to certain specific questions which you ask.

You ask three questions, but in effect they are so interwoven that they really constitute a question as to what is the general effect of such redemption with respect to the city's rights. You want to know whether the general taxes will be revived in case the city redeems, what the city's position and the position of other foreclosed interests will be, and whether the amount paid for redemption could be added to the city's existing claims and enforced by appropriate legal proceedings.

We find it extremely difficult to give a reply to these questions that has the backing of authority. The rights of parties to such foreclosure are not specifically set forth in the statute and can only be determined inferentially. It is quite likely that there will have to be litigation before the law is settled as to these points.

Although the section of the statutes permitting such foreclosures (Revenue Act, Sec. 253) was enacted in 1881, it was not until a comparatively recent date that the practice of foreclosing thereunder was begun. In fact, the Supreme Court in 1912, in the case of *Clark v. Zaleski*, 253 Ill. 63, which involved questions of procedure thereunder, stated that with respect to these matters it was a case of first impression. It held in that case that so far as the time for redemption is concerned and the serving of notice on the parties, the Constitution and the Revenue Act govern the procedure, but that in other respects the foreclosure is the same as that provided by law for other foreclosures in courts of equity.

Since the case last mentioned was decided there have been other decisions involving Section 253, but we are unable to find any controlling the points about which you ask. We believe, however, that if the question were squarely presented the court would hold that the city, as to its interest in the property, upon paying the cost of redemption would be in the same position in which it was before the beginning of the proceedings and could enforce its claims, while the other creditors, including those having claims for general taxes, would be bound by the decree and the sale thereunder. Hence, in our opinion the lien for general taxes would not be revived, the city would again hold its tax title as before the suit was instituted, and the claim of the city would include interest, cost of redemption and any costs incurred. Such claim could be enforced in a Torrens proceeding, ejectment suit or proceeding in equity as the case may be.

Yours very truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,
Corporation Counsel.

**Liens Against Contractor on Michigan Boulevard
Improvement.**

October 15, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

I have at hand your favor of the 24th instant with the information that certain liens, naming them, had been filed in your office for supplies and labor furnished the Citizen's Construction Company, sub-contractor of the Great Lakes Dredge & Dock Company, under the latter's contract with the City of Chicago for work on the Michigan boulevard improvement and stating that the attorney for the Great Lakes Company claims that these liens do not lie against the Great Lakes contracts with the city; that under the statutes the city can only recognize liens for supplies and labor furnished the general contractor; and asking to be advised.

Accordingly we wish to advise you as follows: The only lien, if any, which a sub-contractor, or one who contracts with the sub-contractor known as the sub-sub-contractor, has against funds due the principal contractor from a municipality arises from the provisions of the Illinois statutes on liens, Chapter 82. This chapter primarily was enacted to give a contractor and a sub-contractor a lien on the real estate of an owner for whom work was done by such contractor in erecting buildings or improvements on such real estate. The chapter not only creates the lien but provides the remedy for enforcing it. In the absence of this act no such lien would exist and no right of action would accrue against an owner in favor of a sub-contractor except for its provisions. The wording of the act is general and applies to all owners of real estate.

The state, county and city, however, as owners of real estate would be exempt from the general provisions of the act as the policy of the law forbids the creation of a lien on or the forced sale of property so owned. As it seemed necessary to provide some protection for a sub-contractor on public

work, a separate section was added to the act to provide for a lien by a sub-contractor against the funds due the principal contractor in contracts with municipalities for public improvement. The section added was *Par. 23 of Chapter 82 entitled "Lien against funds due or to become due contractors for public improvement; notice; duty and liability of officer notified."* This section does not create a lien against the property of a municipality but only one in favor of a sub-contractor against the funds due the principal contractor. The intent of this section is to protect those furnishing material or labor to the contractor.

The act must be strictly construed.

Pugh Company v. Wallace, 198 Ill. 422.

The wording of Section 23 is "Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this state shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvements." Can this language be construed to mean that a person furnishing material to a sub-contractor shall also have a lien against the funds due the original contractor? We can find no decision of the courts touching these points.

The other sections of the Mechanics' Lien Act do not apply to Section 23.

County of Coles v. Haynes & Lyons, et al., 134 Ill. App., page 328.

National Bank of LaCrosse v. Petterson, 200 Ill. 215.

But the wording of other sections giving a similar lien to sub-contractors as against a private owner of real estate has been construed and we may turn to these decisions for analogy. Section 21, provides for a lien in favor of a sub-contractor against the real estate of a private owner. The meaning of the section has been construed by the Supreme Court in several cases.

Newhall v. Kastens, 700 Ill. 156.

Smith Bridge Co. v. Louisville, etc., Railway Company, 72 Ill. 506.

Schaar & Koch, et al., v. Knickerbocker, 149 Ill. 441.

These decisions are to the effect that the lien provided for in Section 21 in favor of a sub-contractor does not apply to one furnishing material to a sub-contractor known as a sub-sub-contractor. It would seem therefore that the provisions of Section 23, which provides a lien in favor of a sub-contractor would be given the same construction by the courts, as the provisions of Section 21.

Section 21, however, was amended subsequently to these decisions and a lien given to one contracting with the sub-contractor called the sub-sub-contractor. It is doubtful whether the provisions of Sections 21 and 22 as amended apply to Section 23 but it is possible the courts might so construe the act. But because of such doubt and in the absence of any decisions on the point, it is our opinion that the comptroller should give the same weight to the notices of a sub-sub-contractor, as to those of a sub-contractor and withhold a sufficient amount from funds due the contractor to comply with the provisions of Section 23 and protect himself.

Section 23 was amended in July, 1917, and the amendment re-enacted in 1919 to read as follows:

"It shall be the duty of any such official so notified to withhold a sufficient amount to pay such claim until the same is admitted by the contractor or adjusted by the agreement of the parties, or there has been an adjudication of the same in a court of competent jurisdiction, and thereupon to pay the amount so determined to be due such claimant, if any, and to that end the said county, township, school district, city or municipality or any of the other parties interested may institute suit in the same manner as is provided here in case of privately owned real estate to determine the rights of the parties when such claim is filed."

It was undoubtedly the intent of the Legislature by this amendment to give to a contractor or to a municipality the right under Section 30 of the act to file a petition or bill in court and have the rights of the respective parties determined.

We would suggest that this section be called to the attention of the attorney for the Great Lakes Dredge & Dock

Company, so that the company may file such a suit if it so desires and let the court pass upon the validity of the liens claimed under the notices served upon the city in this case.

Respectfully submitted,

H. CHACE, JR.,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Construction of Civil Service Act.

October 20, 1919.

HON. PERCY B. COFFIN, President, Civil Service Commission.

Dear Sir:

Your communication to the corporation counsel, requesting an opinion as to the proper construction of Section 10½ of the Civil Service Act, as amended and in force July 1, 1919, has been referred to me for reply.

Your letter propounds the following questions.

1. Does the said amendment apply to eligible lists posted prior to July 1, 1919?

2. Does the said amendment apply to what are known as "reinstatements" under the present civil service rules; that is, persons who have served part of their probation period, or even all of same, and have been laid off on account of lack of work or lack of funds, and their names placed on the reinstatement, or eligible list for reinstatement when a vacancy occurs?

The aforesaid amendment of Section 10½ of the Civil Service Law (approved June 28, 1919—Laws of Ill., 1919, page 287), is as follows:

"Persons who were engaged in the military, or naval service of the United States during the years 1861, 1862, 1863, 1864, 1865, 1898, 1899, 1900, 1901, 1902, 1914, 1915, 1916, 1917, 1918 or 1919, and who were honorably discharged therefrom, and all persons who were engaged in such military or naval service during any of said years, who are now or may hereafter be on in-

active or reserve duty in such military or naval service, not including, however, persons who were convicted by court-martial of disobedience of orders, where such disobedience consisted in the refusal to perform military service on the ground of alleged religious or conscientious objections against war, shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such office, and it shall be the duty of the examiner or commissioner certifying the list of eligibles who have taken the examinations provided for in this act, to place the name or names of such persons at the head of the list of eligibles certified for appointment, *provided, however*, that this shall not apply to promotions provided for in Section 9 hereof, but in such promotions such person or persons shall be given an additional credit in the promotional examination of one per cent (1%) (on the basis of 100%) for each six months or fraction thereof of such military or naval service; *and, provided, further* that such additional credit shall not be computed so as to increase or decrease the rating allotted to any person competing in such examination for ascertained MERIT (efficiency) or seniority in service. *And provided, further*, that no person shall be given such additional credits in the promotional examination for more than eighteen months of such military or naval service.

“Section 2. Because of an emergency, this act shall be in full force and effect from and after its passage and approval.”

Under the foregoing act the following persons are eligible for preferment in appointment to civil offices:

1. Persons engaged in the military or naval service of the United States during any of the years enumerated—who have been honorably discharged therefrom.

2. Persons who are now or may hereafter be on inactive or reserve duty in such military or naval service—Except such persons who were convicted by court martial of disobedience of orders, where such disobedience consisted in the refusal to perform military service on the ground of alleged religious or conscientious objections against war.

The act provides that persons who are eligible under the foregoing provisions, and are otherwise qualified, shall have

their names placed at the head of the list of eligibles who have taken the examinations provided for in the Civil Service Act.

Section 8 of the Civil Service Act relating to cities (Hurd's R. S., 1915-1916, page 451) is as follows:

"Sec. 8. From the returns or reports of the examiners, or from the examination made by the commission, the commission shall prepare a register for each grade or class of positions in the classified service of such city of the persons whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of such commission, and who are otherwise eligible; and *such persons shall take rank upon the register as candidates in the order of their relative excellence as determined by examination without reference to priority of time of examination.*" (Italics ours.)

Section 3 of Rule III of the Civil Service Rules provides that the proficiency of applicants in each of the subjects of examination shall be rated on a scale of 100 per cent maximum and 70 per cent as a minimum and that no person whose general average is below 70 per cent shall have his name entered on the eligible register resulting from such examination.

From the foregoing it is clear that any person coming within the designations 1 and 2 above set forth is entitled to preference in the preparation of eligible lists by the examiner or commissioner for certification and appointment as provided in said act; that if an eligible list now exists and such person has not taken an original examination, he may yet participate in an examination of the same scope and character and if successful in obtaining a rating of 70 per cent or higher, his name shall thereupon be placed, "at the head of the list of eligibles" to be certified for appointment, or in the absence of an existing list, then at the head of the list obtained from such examination.

When a person is certified and appointed pursuant to the provisions of the Civil Service Law and the rules of the commission, his name no longer remains on an eligible list for certification, as he cannot be eligible for certification and ap-

pointment from a list, after such certification and appointment is made.

Under Section 6 of Rule IV of the Civil Service Rules, it is provided: "Time served on probation, whether continuous or not, shall be credited upon the period of probation."

So that, as soon as an original appointment has been made, the status of the appointee becomes different from that of being eligible for appointment. He at once begins to shorten the time within which he is to become a member of the classified service, and when his period of probation ends, if he is still employed, he obtains the protection from removal from the classified service, except on charges, as provided by Section 12 of the Civil Service Act.

Both during and after the expiration of the period of probation such employe may be laid off for lack of work or lack of funds, but in such case his name should go on a reinstatement list for reinstatement and not on an original eligible list for certification.

We, therefore, are of the opinion that the foregoing act does not apply to what are known as reinstatement lists, as such lists consist of the names of persons who have heretofore been "certified for appointment," and have been appointed and have afterward been laid off for lack of work or lack of funds and are entitled to reinstatement in case of a vacancy in a position of the same class and grade as that in which they were formerly employed. This also includes probationers.

We are also of the opinion that the act in question clearly indicates that all persons coming within the designations numbered 1 and 2 hereinbefore set forth are to be given preference or precedence in certification and appointment to civil offices and that the existence of eligible lists at the present time does not affect the preference which is given them by Section 10½ of the act as amended.

Yours very truly,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Civil Service Rights of Army Nurses.

October 23, 1919.

HON. PERCY B. COFFIN, President, Civil Service Commission.
Dear Sir:

In answer to your letter of October 1st, wherein you ask that the commission be advised as to whether or not army nurses are entitled to preference for appointments to civil offices, pursuant to the provisions of Section 10½ of the City Civil Service Act, as amended and in force and effect July 1, 1919, and especially as to Miss Mida E. Irving and Miss Ella Engh, whom it appears, were members of the Army Nurse Corps, we submit that Section 10½ provides in part that:

“§10½. Persons who *were engaged in the military, or naval service of the United States during the years 1861, 1862, 1863, 1864, 1865, 1898, 1899, 1900, 1901, 1902, 1914, 1915, 1916, 1917, 1918, or 1919, and who were honorably discharged therefrom, and all persons who were engaged in such military or naval service during any of said years, who are now or may hereafter be on inactive or reserve duty in such military or naval service, not including, however, persons who were convicted by court-martial of disobedience of orders, where such disobedience consisted in the refusal to perform military service on the ground of alleged religious or conscientious objections against war, shall be preferred for appointments to civil offices.* * * *”

In view of the foregoing, it appears to us that to establish her right to any such preference, any such nurse must show that she was engaged in the military or naval service of the United States, and, either honorably discharged therefrom or now on inactive or reserve duty in such military or naval service, and not included in the class which the act expressly provides are not entitled to such preference.

The Federal Statutes provide for the manner in which both the army and navy shall be established and organized, and among such provisions thereof pertaining to the organization of the regular army of the United States, we find they

provide for the establishment and organization in such regular army of what is designated as the medical department thereof, and included in such department and a part thereof, what is designated as the army nurse corps; which army nurse corps is under the control and command of the surgeon general. We further find that the provisions of such statutes pertaining to such medical department also provide for an organization therein known as the rescue nurses, which is likewise subject to the control of the surgeon general, and when any member of the reserve nurses is assigned to active duty, she becomes an active member of the army nurse corps and the medical department of the regular army of the United States. It also appears that any such reserve nurse may have enlisted as such for a longer period of time than that for which she is required to engage in active service, and by reason thereof, if such be the case, at the conclusion of such period of active service such nurse is relieved from such active service and the authority and obligations incident thereto, rather than discharged outright from the military service; and, by operation of law, continues to be a reserve nurse subject to such further call for active service as the exigencies may demand.

Pursuant to the request of the undersigned addressed to the adjutant general we are in receipt of a letter from the surgeon general wherein he states that reserve nurses when assigned to active duty are considered as in the military service of the United States; a copy of which letter is attached hereto.

Therefore we are of the opinion that when any such reserve nurse or any person eligible thereto becomes an active member of the army nurse corps, and assumes the oath and obligations incident thereto, such nurse or person is engaged in the military service of the United States within the meaning of the provisions of said Section 10½ of the City Civil Service Act. Inasmuch as the law provides that all persons who were engaged in such military or naval service during any of said years, who are now or hereafter on inactive or reserve duty in such military or naval service, with certain

exceptions, shall be preferred for appointments to civil offices, it is not material in this instance to determine whether or not such relief from active service would constitute an honorable discharge within the meaning of such provisions of the Civil Service Act. We are inclined to believe that in the absence of anything to show that such relief from active service was occasioned by some dishonorable act upon the part of the person so relieved such relief from active service would constitute in fact and in law an honorable discharge within the meaning of such provisions of the Civil Service Act. To hold otherwise would tend to defeat the obvious purpose of the provisions of Section 10½ when considered as a whole. In view of the foregoing and the matters and things set forth in the several documents submitted by Miss Mida E. Irving and Miss Ella Engh in support of their respective claims showing that both of them were engaged in the military service of the United States within the period of time fixed by Section 10½, that they were relieved from active service therein and are now on inactive or reserve duty as such reserve nurses, we are of the opinion said Miss Mida E. Irving and Miss Ella Engh are entitled to be preferred for appointments to civil offices pursuant to the provisions of the City Civil Service Act as now amended.

Pursuant to your request we herewith enclose copies of the orders of assignment to active service, and release therefrom, pertaining to the aforesaid claims.

Yours very truly,

H. C. FOSTER,

Approved: *Assistant Corporation Counsel.*

SAMUEL A. ETTELSON,
Corporation Counsel.

Garages in Basements of Fire Proof Buildings.

October 28, 1919.

HON. J. C. McDONNELL, Chief of the Bureau of Fire Prevention and Public Safety.

Dear Sir:

We are in receipt of your communication of October 23rd, with reference to the suit instituted, at your request, against

the Hotel La Salle Garage, in which suit you seek to have the owner of the garage in question fined for a violation of Section 110 of the Fire Prevention and Public Safety Ordinance.

There does not appear to be any dispute as to the facts in the matter. Automobiles having gasoline in their tanks are kept in the basement of the Hotel La Salle Garage.

In your communication you quote that part of Section 110 upon which you rely to secure a conviction as follows:

“There shall be no basement in any such building except for boiler room purposes unless such building, including the roof and protection of the roof beams and roof girders, is of fireproof construction throughout and is equipped throughout with an approved sprinkler system and with no floor openings between the basement and other floors except for stairs and elevators and such openings shall be enclosed in both the basement and first floor by walls of brick, tile or concrete and equipped with doors as hereinbefore specified. There shall be no openings from the boiler room except to the outside of the building. Grease, oil or gasoline shall not be stored, exposed or handled in such basement and no work or service shall be performed on an automobile, motorcycle or similar vehicle in such basement.”

You claim also in your communication that you had a communication under date of November 19, 1917, from the manager of the Hotel La Salle Garage in which he stated that the basement was to be used for storage purposes only and that no cars with gasoline in the tanks thereof would be kept in the basement.

We understand that you concede that the garage in question is fire-proof and has been constructed in accordance with the ordinance of the city regulating the construction of garages.

From a reading of the entire ordinance it is clear to us that the Council intended to prohibit garage owners from keeping automobiles in the basement of a garage of any building not fire-proof, and it is also clear to us that the Council intended to permit automobiles to be kept in basements of garages where the garage in question, including

the roof, protection of the roof beams and roof girders were of fire-proof construction.

The Hotel La Salle Garage is of fire-proof construction and while the storage of gasoline, grease or oil in such a basement is prohibited by the ordinance it is clear to us that automobiles may be kept there. We do believe that the mere fact that there may be gasoline in the tanks of the automobiles that may be in the basement is a violation of the ordinance.

The storage of gasoline, in our opinion, must be construed to mean keeping gasoline in barrels or other separate receptacle and that a garage owner cannot be presumed to be storing gasoline if the only gasoline in the garage is that in the tanks of automobiles.

It is, therefore, our opinion that you cannot prohibit automobiles in basements of fire-proof buildings because the automobiles have gasoline in their tanks. We do not believe that Section 110 of the ordinance in question is susceptible of the construction you place upon it.

We, therefore, respectfully suggest that when this suit is again called for trial that you direct that the same be dismissed.

Yours very truly,

JAMES W. BREEN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Mechanics Liens on Municipal Funds.

October 30, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We have at hand your favor of the 29th inst., enclosing papers in connection with contract of E. J. Mahoney Company, Inc., with the City of Chicago for re-coating the Municipal Pier and stating that a letter of October 6th from

E. W. Austin purports to be a notice of lien covering moneys claimed to be due the Standard Sand & Gravel Co. You ask as to the legal sufficiency of this notice to warrant you in holding moneys to the amount of the lien.

The notice claims that money is due the Standard Sand & Gravel Co. from E. J. Mahoney, Inc. It is quite informal and entirely lacking in detail as to the cause of the indebtedness, that is, it does not specifically state that the indebtedness was incurred for material, labor, etc., furnished to the contractor on a public improvement. The notice appears to have been served for the purpose of informing the city of certain suits pending by virtue of which suits a lien is to be created against any funds due the contractor. It is doubtful from the wording of the notice whether it was intended to be one of lien under the Mechanics' Lien Act.

It seems, however, that E. J. Mahoney & Co. were contractors with the city for a public improvement. The Mechanics' Lien Act provides that a sub-contractor, furnishing material, etc., to such contractor, shall have a lien against the funds due the contractor, provided "such person shall, before payment or delivery thereof is made to such contractor, notify the official * * * whose duty it is to pay such contractor of his claim by written notice." And the act further provides that it shall be the duty of the official so notified to withhold a sufficient amount to pay such claim until the matter is properly adjudicated. I am referring here to Section 23 of the Mechanics' Lien Act, as amended June 28, 1919.

We are of the opinion, therefore, that in spite of the informality of the notice, it is sufficient to warrant the comptroller in withholding a sufficient amount from the funds due the contractor to cover the amount claimed in the notice until the rights of the parties are properly adjudicated.

Yours very truly,

HENRY T. CHACE, JR.,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Abating Insanitary Conditions in Interurban Cars.

October 30, 1919.

HON. JOHN DILL ROBERTSON, Commissioner of Health.

Dear Sir:

Receipt of your letter of the 8th inst., with a request that you be informed as to the legal rights the Department of Health has to abate insanitary conditions in the cars of interurban roads and the rights of the department to require adequate ventilation, is hereby acknowledged.

Section 2210 of The Chicago Code of 1911, as amended on December 28, 1914, Council Proceedings, page 2648, in our opinion applies to the interurban roads.

The reasonableness of the requirements of this section has been upheld by the courts (*City of Chicago v. Chicago Surface Lines*, 192 Ill. App. 1). The section as contained in the code was held by the Appellate Court, in the First District, in the case of the *City of Chicago v. South Side Elevated Railway Company*, 183 Ill. App., page 181, not to apply to elevated railways, but it was amended December 28, 1914, and will now, in our opinion, be held valid as to street railways, elevated railways, interurban railways and steam railroads operating from point to point within the City of Chicago.

It is possible, however, that the courts might hold that the city's power in respect to enforcing an ordinance of this character is subordinate to that of the Public Utilities Commission and that measures of this kind adopted by the city must yield to conflicting regulations issued by the commission.

Yours very truly,

GOTTHARD A. DAHLBERG,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

Employees Who Left the Service in 1918.

November 13, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir :

We are in receipt of your letter of recent date concerning employes who left the service of the city in the year 1918 before the passage of the Annual Appropriation Bill of that year. The question presented is whether these are entitled, for the period in which they worked, to the compensation fixed by the appropriation ordinance for the positions formerly filled by them. This question was urged repeatedly since it arose, and there have been opinions rendered covering the point, but the ruling made thereon has not been applied directly to the men involved in your inquiry.

It appears that about twenty men were employed on the police force at the beginning of the year 1918, prior to the passage of the Annual Appropriation Bill for 1918, but left the service before the new salaries were fixed thereby. They have claimed since then that, although they went out of the employ of the city before the salaries were advanced, they were nevertheless entitled to the new rate of compensation for the time they served. One of them brought suit and recovered the difference between the amount paid him and the amount he would thus be entitled to.

A somewhat similar question arose this year involving employes in the Department of Public Works. In answer to the inquiry of the commissioner of public works, we held that employes who left the service before the passage of the appropriation bill were entitled to the additional compensation provided for therein for the time they worked, because they were paid under ordinances which authorized certain pay subject to adjustment by the Appropriation Bill.

We see no good reason why the same ruling should not apply to the men in question, since the ordinances under which they were paid prior to the passage of the Appropria-

tion Bill of 1918 contained provisions substantially the same as those pointed out in the similar ordinances this year.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Transfer of Funds for Employment of School Nurses.

November 14, 1919.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your letter of recent date in which you state that your committee had before it a question of transferring funds within the Department of Health for the purpose of continuing school nurses on the pay-roll, and in which you request an opinion as to whether "this activity can be re-created after June 30th by transfer when the original appropriation had been for a short period which had expired."

While your statement is not entirely clear, we assume that you refer to the appropriations for School and District Nursing under code designation 37-A-10, and that we are to understand that the said appropriations had been entirely consumed and the activity discontinued and that it is now your purpose to revive it.

The statute relating to such transfers gives authority to the City Council "to make transfers within the department or other separate agency of the municipal government, of sums of money appropriated for one corporate object or purpose to another corporate object or purpose." (Art. VII, Sec. 2a, Cities and Villages Act.)

It has been our uniform practice, in construing this provision, to make the interpretation as broad as possible, to the end that the City Council may not be hampered in its work of providing for necessary activities. That is to say, the only

limitations that we place on this provision of the statute are that the purpose for which the transfer is made must be a lawful corporate purpose and that the transfer must be within the department.

Hence, we believe it would not be contrary to the statute to make the transfer you contemplate.

Yours truly,

LEON HORNSTEIN,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Mechanics Liens Against City Funds.

November 15, 1919.

HON. GEORGE F. HARDING, City Comptroller.

Dear Sir:

We have at hand the communication of Eugene R. Pike, city comptroller, of January 25, 1919, informing us that the Rennacker Construction Company has a contract with the city for paving West 56th street from Halsted street to Center avenue; that John Zeder had a claim against the Construction Company for one hundred and twenty-seven dollars (\$127.00) for labor and material furnished on the improvement and filed a claim for lien with the city against funds due the Construction Company; that therefore he insisted upon withholding from the company an amount equal to the Zeder claim; that thereupon the Construction Company made a deposit to cover the amount of the claim and that the deposit has since been in your possession; that the Construction Company claims that it does not owe Zeder anything and has repeatedly requested him to bring suit, but without avail; that the Construction Company takes the position that the Zeder claim now being nearly seven years old has been outlawed.

The question you wish answered we presume is: how should the comptroller dispose of the deposit of the Rennacker

Construction Company so as to protect himself against the claim for lien filed against these funds.

The right of a sub-contractor to a lien against the money, bonds or warrants due a contractor by a municipality is given by Section 23 of an act to revise the law in relation to mechanic's liens approved May 18, 1903, in force July 1, 1903, and acts amendatory thereof. This section provides that the sub-contractor shall have a lien against funds due to the contractor for a public improvement upon serving the city with a written notice.

He may file his bill to enforce the lien at any time before the claim of the sub-contractor on his contract with the contractor is outlawed by the Statutes of Limitations. If that contract is in writing, the limitation would be ten years. If an oral contract, the period would be five years. The comptroller, therefore, not being informed whether the Zeder contract was a written or oral one, must assume that it was in writing and should make no disposition of this fund within ten years from the completion of the work by the contractor unless ordered to do so by a court of competent jurisdiction.

Said Section 23 of the Mechanic's Lien Act was amended in 1917, which amendment was re-enacted June 28, 1919, p. 642 of the laws of the State of Illinois, subject "Liens." This amendment gives the parties interested a remedy which prior to its enactment they did not have. The amended part of the section reads as follows:

"It shall be the duty of any such official so notified to withhold a sufficient amount to pay such claim until the same is admitted by the contractor or adjusted by the agreement of the parties, or there has been an adjudication of the same in a court of competent jurisdiction, and thereupon to pay the amount so determined to be due such claimant, if any, and to that end the said county, township, school district, city or municipality or any of the other parties interested may institute suit in the same manner as is provided herein in case of privately owned real estate to determine the rights of the parties when such claim is filed."

The language of this amendment is somewhat uncertain in its meaning, in that it does not refer to any particular sec-

tion of the Mechanic's Lien Law, but only refers in general terms to other sections of the act. Section 30 of the act is the only one in our opinion applicable, it is entitled, "*Proceedings for general settlement: Interplader: how liens and claims cut off and judgment thereon stayed in such proceedings*" and provides that the owner or others interested may file a bill or petition, setting up the facts and asking to have the matters adjudicated.

The comptroller could file such a bill, if he so desired; but we believe this section of the act should be called to the attention of the Rennacker Construction Company, which company could then, if it saw fit, take the matter into court for determination.

Respectfully submitted,

HENRY T. CHACE, JR.,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTIELSON,

Corporation Counsel.

**Application of Delia Lenehan, Widow of Bernard J.
Lenehan for a Pension.**

November 18, 1919.

TO THE BOARD OF TRUSTEES OF THE POLICE

PENSION FUND OF THE CITY OF CHICAGO.

Gentlemen:

We are in receipt from you of the application of Delia Lenehan, widow of Bernard J. Lenehan, a detective sergeant who died on October 5, 1919, as the result of gunshot wounds received by him on October 3, 1919, while in and in consequence of the performance of police duty, together with your request for an opinion as to whether or not, under the law, she is entitled to a pension.

There does not appear to be any question in regard to the cause of the death of Detective Sergeant Lenehan. It is conceded that on October 3, 1919, at 12:57 a. m. he, together with Detective Sergeant Burns, was on duty in the vicinity

of 3301 West Madison street, and that about 12:57 a. m. on said date while passing a building known as Mulhern's saloon, they heard a commotion, and, upon entering, found two holdup men in the act of robbing the proprietor. Both officers attempted to place the bandits under arrest but before they had an opportunity to defend themselves the bandits fatally shot both officers. So that, as a matter of law, Detective Sergeant Bernard J. Lenehan came to his death as the result of injuries sustained by him while in and in consequence of the performance of police duty.

The objection that has been urged as the reason for refusing the widow, Delia Lenehan, a pension is the fact that her marriage to the deceased took place less than one year prior to his death. The marriage certificate presented discloses that the marriage occurred on the 29th day of January, 1919, and as his death occurred on October 5, 1919, the fact that she was married less than one year is not disputed. It, therefore, becomes necessary for us to consider the provisions of the Police Pension Fund Act of the State of Illinois in force and effect October 5, 1919, authorizing the granting of pensions to widows of police officers whose deaths have occurred from injuries received while in and in consequence of the performance of police duty.

Section 5 of said act, in so far as it applies to the question under consideration, is as follows:

“Whenever any person who has been appointed and sworn as a regular or probationary member of any such police force shall while in, and in consequence of, any performance of police duty, lose his life or receive injuries from which he shall thereafter die, leaving a widow or child or children under the age of eighteen (18) years, then, upon satisfactory proof being made to it, such board shall order and direct that the pension described in Section 3 hereof to be paid to the widows and children shall be paid to such widow and such child or children, subject to the limitations contained in said Section 3.”

Section 3 of the Police Pension Fund Act provides as follows:

“§3. Whenever any person shall have been or shall hereafter be appointed and sworn as a probationary or

regular policeman in any such city, and shall have served for a period of twenty (20) years or more as such policeman in the police force of any such city, or where the combined years of service of such person in the police department and fire department of any such city shall aggregate twenty (20) years or more, in either such case when such person shall have arrived at the age of fifty (50) or more years he may make application to said board for retirement, and said board shall order and direct that such policeman, after his retirement from the police force, shall be paid a yearly pension;

“(A) Equal to one-half of the amount of the salary attached to the rank which he may have held in said police force for one year immediately prior to the time of his retirement from the police force: *Provided, however,* that the maximum sum for such pension shall not exceed the sum of one thousand three hundred (\$1,300) dollars per annum to any one person who retires as general superintendent of police, or one thousand one hundred and fifty (\$1,150) dollars per annum to any person who retires as first deputy superintendent of police or one thousand one hundred (\$1,100) dollars per annum to any person who retires as captain of police, or one thousand (\$1,000) dollars to any person who retires as a lieutenant of police, and the maximum sum for all other persons retiring shall not exceed the sum of nine hundred (\$900) dollars per annum and the minimum be not less than six hundred (\$600) dollars per annum, and notwithstanding any provision contained in this act or the act to which this is an amendment, the pension to be paid from and after the date of the passage of this act to any person occupying the position of officer of captain of police or a position or office superior in rank thereto, who has been heretofore retired, voluntarily or otherwise, from the department and is now receiving the benefits of the act to which this is an amendment and of this act, shall be one thousand (\$1,000) dollars per annum.

“(B) After the death of any such policeman, his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him hereunder, shall receive a pension of fifty (\$50.00) dollars per month and an additional sum of ten (\$10.00) dollars per month for each of his children under eighteen (18) years of age. Should any such child cease attending school between the age of fourteen (14)

and eighteen (18) years, the aforesaid sum shall be reduced to five (\$5.00) dollars per month.

“Should any policeman pensioned hereunder leave no widow surviving him, or should his widow die before his children arrive at the age of eighteen (18) years, each child shall receive, while regularly attending school, the sum of fifteen (\$15.00) dollars per month. Pensions paid to children shall cease as to any such child upon his or her arriving at the age of eighteen (18) years.

“Any such policeman of any such city who shall have served as aforesaid for a period of twenty (20) years and who has not yet reached the age of fifty (50) years may make application to said board for retirement, and any such policeman may retire forthwith. In case such policeman shall make monthly contributions to the pension fund of a sum equal to twice the amount deducted from his wages under Section 9 hereof, the said board shall order and direct that upon said policeman arriving at the age of fifty (50) years he be paid the amount specified aforesaid under the paragraph designated ‘A,’ and that upon his death, either before or after his arriving at the age of fifty (50) years, his widow or children be paid the amount specified aforesaid under the paragraph designated ‘B,’ subject to the limitations therein contained. Notwithstanding any provision contained in this act or the act to which this is an amendment, no pension shall be granted to any policeman after March 1, 1917, unless such policeman shall be qualified for retirement or for a pension as in this act provided; the intention being that the terms and conditions of retirement and of the granting of pensions for such policemen under this section shall be retroactive in their effect, and shall relate to all applicants for pensions after the date aforesaid. In case any pension shall have been granted after said date, contrary to this act, such pension shall at once cease and determine and the policeman to whom such pension shall have been granted shall thereupon be reinstated in the department and in the rank held by him at the time of his retirement.”

Paragraph (B) of the said section, which appears to be cited by those objecting to the granting of this pension, provides that after the death of a policeman his widow, in case the marriage of such policeman shall have taken place more than one year prior to the time a pension is granted him here-

under shall receive a pension of fifty dollars per month, and an additional sum of ten dollars per month for each of his children under the age of 18 years. There does not appear to be anything in Section 3 that requires the widow of a police officer who has died as the result of injuries received while in, and in consequence of, the performance of police duty, to be married for one year or more prior to the date of death. Section 5 of the Police Pension Fund Act expressly provides that whenever any person who has been appointed and sworn as a regular or probationary member of the police force shall, while in, and in consequence of, any performance of police duty lose his life or receive injuries from which he shall thereafter die leaving a widow or child or children under the age of 18 years, then, upon satisfactory proof being made to it, the Pension Board shall order and direct that the pension described in Section 3 to be paid to the widows and children shall be paid to such widow and such child or children subject to the limitations contained in Section 3.

In our opinion, the phrase "subject to the limitations contained in Section 3" does not mean that the marriage must have occurred more than one year prior to the death of such policeman, because the language used in Section 3 requiring a woman to be married to a pensioner one year prior to the time a pension is granted him can not be construed to apply to cases where police officers are killed in the discharge of their duty. The evil sought to be remedied by the General Assembly when this provision was placed in the law was to make it impossible for designing females to marry dying pensioners in order to secure the pension provided by law for widows. It was never intended by the General Assembly that this language should be construed in a manner that would deprive the widow of a police officer killed in the discharge of his duty from receiving a pension.

It is, therefore, our opinion that, under the provisions of the Police Pension Fund Act, the widow of a police officer whose death has resulted from injuries sustained while in, and in consequence of, the performance of police duty, is entitled to and should receive a pension regardless of whether or not

she had been married to the deceased officer for more than one year prior to his death.

We, therefore, recommend that Your Honorable Board grant the application of Delia Lenehan, the widow of Detective Sergeant Bernard J. Lenehan, for a pension.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Dedication of Streets by Board of Education.

November 21, 1919.

HON. CHARLES R. FRANCIS, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of November 19th, accompanying a plat by which the Board of Education of the City of Chicago is to dedicate a public street through Section 16-38-13, in which you ask to be advised if the certificates on the plat are in proper legal form, and if the method indicated therein is the proper legal course to pursue.

In reply we beg to inform you that Section 133 of Chapter 122, Hurd's Revised Statutes, 1917, provides as follows:

“§ 133. POWER OF BOARD AS TO RENTING BUILDINGS, LETTING SCHOOL PROPERTY ON LEASEHOLD—SITE OF REAL ESTATE.) The Board of Education may rent buildings, rooms and grounds for the use of schools or for the purpose of school administration. The board shall have power to let school property on leasehold for a term of not longer than ninety-nine years from the date of the granting of the lease; but it shall not make or renew any lease for a term longer than ten years, nor alter the provisions of any lease heretofore or hereafter made whose unexpired term may exceed ten years, without the vote of two-thirds of the full membership of the board.

“No sale of real estate, or interest therein, used for school purposes or held in trust for schools shall be made except by the City Council, upon the written request of

the Board of Education, which shall have ordered said request by a vote of not less than three-fourths of its full membership. (As amended by act approved and in full force April 20, 1917. L. 1917, p. 724.)”

According to the plat submitted it is the intention of the Board of Education to dedicate a sixty-six foot strip of land for street purposes, and while it would not legally be termed as a sale, it is, however, a conveyance or disposition of an interest in real estate to the public.

In the case of *Elson v. Comstock*, 150 Ill. page 303, the court in construing the effect of a dedication of property by plat said: “A dedication of property is in the nature of a conveyance for the purpose of the use.”

In the case of *Crotty v. Effler*, 54th S. E. Repts., 345-347 (60th W. Va. 258-264), the court in defining the word ‘sale’ in reference to real estate said: “The word sale and conveyance when applied to real estate are in common parlance in judicial decisions and by law writers used interchangeably, and a deed of conveyance of real estate therefore answers a reference to a sale of real estate.”

Our Supreme Court has repeatedly held that when a plat is executed, acknowledged and recorded in conformity with the provisions of the statute, it will operate as effectually as a deed to convey the title to the street mentioned therein to the municipality.

Woollacott v. City of Chicago, 187 Ill. 504.

Corbin v. B. & O. C. Term. R. R. Co., 285 Ill. 439.

Maywood Co. v. Village of Maywood, 118 Ill. 61.

Reese v. City of Chicago, 38 Ill. 322.

We are therefore of the opinion that as a plat operates as a conveyance of the title of the property it will therefore be necessary under the provisions of the above section of the statute that the Board of Education of the City of Chicago make a written request to the City Council, which request should be ordered and passed by said board by a vote of not less than three-fourths of its full membership, also submitting therewith a plat of the proposed dedication and after the request is granted by the City Council, the plat should be certi-

fied and executed in accordance with the provisions of Chapter 109 of an act to revise the law in relation to plats, appearing on page 2225 of Hurd's Revised Statutes, 1917. We would advise that this matter be submitted to the Law Department of the Board of Education for their consideration.

Respectfully yours,

BENTON F. KLEEMAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Claim of Stephens-Adamson Mfg. Co.

November 21, 1919.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of your communication in reference to the claim of the Stephens-Adamson Mfg. Co. against the city, growing out of work in connection with the Mayfair Pumping Station.

The above claim arises out of a contract entered into on July 25, 1916, which provided that the work to be done thereunder was to be completed within 270 days from the date of a notification, making the date of completion May 2, 1917. The total amount of the contract was \$37,050, with agreed deductions of \$142.28, making a total net amount of the contract \$36,907.72.

From the communication from the Bureau of Engineering, we have found the following to be the facts covering this case:

That the contractor immediately manufactured the machinery and equipment necessary for the carrying out of the contract with the city, and stored the same at his shops and on the station site because of the notification from the City of Chicago that they could not proceed with the work. The engineer in charge for the City of Chicago directed the contractor to be ready for work on July 12, 1917, more than a

month after the time set for completion under the terms of the contract.

Pursuant to the engineer's direction the contractor had his erector in Chicago ready for work on July 12, 1917, but because of the condition of the buildings, it was impossible for the contractor to start work until four weeks after July 12, 1917, at which time the contractor started his work and completed the same within a reasonable time.

On account of the delay caused, it was necessary for the contractor to rehandle the material which was to go into the work at the Mayfair Pumping Station, and because of said rehandling, said contractor has expended the sum of \$250. Under the terms of the contract, a bond was provided for, and because of the extension of the contract the contractor was compelled to renew his bond at an expense of \$55.57, which is the customary rate for such bond.

On account of the delay caused, the work was started in a period when salaries were much higher than during the period originally provided for in the contract; that as the result of the delay and performing the work during the period of increased wages, the contractor expended for increased superintendent's salary the sum of \$240; for increased salaries of mechanics and others the sum of \$130.43.

These items are admitted to be fair charges by the Bureau of Engineering and are true representations of actual expenditures by the contractor. The other items claimed by the contractor we do not believe are tenable. The Bureau of Engineering sets forth a paragraph in said contract, as follows:

"Should the contractor be delayed or work suspended by the city for any cause, there shall be added to the times of completion a time equal to any or all such delays caused by the city; but the contractor shall not be entitled to claim damages or extra compensation for such delay or suspension."

The contract also contains the provision:

"If work herein required shall not have been completed sufficiently for actual service, in accordance with the terms of the contract and these specifications forming a part thereof within the time of completion herein stated,

as such delay will work an injury to the city, the damages from such delay not being readily calculable, there will be deducted from the contract price and retained by the city as its ascertaining and liquidated damages the sum of fifty dollars (\$50.00) for each day after the date of time of completion that the work herein required is not sufficiently completed for actual service."

We believe when both of the foregoing provisions are read together that the fair intent and purport of the contract is that the work provided for is not to be unduly delayed by the City of Chicago; that the provision for delay is to protect the city in case there is an unreasonable delay on the part of the contractor. The facts in this case are different. The contractor was not able to start work until more than one month after the date set for completion under the contract, because of the city's fault. In view of said facts, we feel that there is a strong probability that the contractor would be able successfully to prosecute a suit for the amount claimed, *i. e.*, the sum of \$676.00, as the equities in this matter appear to be very much on the side of the claimant, the Stephens-Adamson Mfg. Co. Hence, the City Council may properly authorize the payment of that part of the claim above mentioned amounting to the sum of \$676.00.

Very truly yours,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Liability of City for Judgment Against Police Officer.

December 12, 1919.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

Referring to your letter to the corporation counsel in which you ask an opinion as to whether the Police Department can legally pay a judgment secured against Captain

Costello, we beg to advise you that the Police Department can not pay the judgment in question.

The city could not be held responsible for this judgment for the reason that the police officers are not agents or servants of the city appointing them within the rule making the corporation answerable for their acts, nor is a municipal corporation liable for the non-feasance or misfeasance of the officers of its police. (*City of Chicago v. Williams*, 182 Ill. 135.)

In the case of *Carrie Culver v. the City of Streator*, 130 Ill. 238, the court held that

“Police officers appointed or employed by a city are not its agents or servants so as to render the city responsible for their unlawful or negligent acts in the discharge of their duties, or in executing or enforcing police ordinances and regulations.”

That case was followed in the *City of Chicago v. Williams*, 182 Ill. 135; *Edward C. Craig, v. City of Charleston*, 180 Ill. 154; *Frazer v. City of Chicago*, 186 Ill. 480.

From the above cases it is evident that the city can not be held liable in cases of this character.

Yours very truly,
THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

City's Liability for Damage Caused by Leak in Water Main.

December 12, 1919.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

In answer to your letter of June 4th to the corporation counsel, wherein you request an opinion as to the city's liability for alleged damages sustained by the Sawyer Biscuit Company on August 17, 1918, at 1029 West Harrison street, occasioned, as it is claimed, by a leak in the water main at said place, we beg to state that from our investigation there was

no act of negligence on the part of the city by which it could be held liable for this occurrence.

It appears from the report of John P. Allen, foreman of the First District Water Pipe Extension, that the first district was notified of a leak at 1029 West Harrison street; that work was started on August 19, 1918; that on August 20 they found a leak in an old abandoned service pipe inside of the roundway leading to the property of the Sawyer Biscuit Company and that they found no leak in the main.

In the case of *City of Chicago v. Selz, Schwab & Co.*, 202 Ill., reading from page 549, it is said:

“There were no facts stated from which the law would imply a duty of inspecting the pipes laid deep in the earth below the streets, or any facts showing for what reason an inspection would or could be necessary.
* * * An inspection of mains and pipes under the streets would be impossible and if there were any facts showing the necessity or propriety of such an inspection they should have been alleged.”

In the case of *Terry v. The Mayor*, 8th Bosworth 510, the court said:

“No one is responsible for injury committed by their breaking unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident for which no one is responsible. There is no evidence that the pipes were originally defective and as they were in long before the damage in this particular matter, they must have been originally strong. * * *

“If the pipes were originally sound there was no proof or want of care in repairing any known defects or discovering them. Neglect is not to be presumed any more than fraud, except in cases where the policy of the law places the burden of discovering it upon the party.”

The mere bursting of a water pipe is in itself no evidence of negligence on the part of a municipality. The city is not required by law to so construct its water mains that accidents are impossible. All that is required is to use ordinary care to keep its water mains ordinarily safe under all circumstances. Nor is a municipality liable for latent or unseen de-

fects in its water mains not discoverable in the exercise of ordinary care.

We find also from our investigation, that the leak in question was in an old abandoned service pipe leading to the property of the claimant. That the employes of the water pipe extension immediately upon being informed of the leak, went to the place in question and skillfully repaired the said service pipe.

Our opinion, therefore, is that there was no negligence on the part of the city and consequently the city can not be held liable.

Yours respectfully,
 THADDEUS F. KUFLEWSKI,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

Structures Over Public Alleys.

December 18, 1919.

HON. JOHN TOMAN, Chairman Committee on Streets and Alleys.

Dear Sir:

We are in receipt of an ordinance pending before your committee purporting to grant permission and authority to Louis Pfaelzer & Sons, a corporation, its successors and assigns, to construct, maintain and use a structure over the north and south 16-foot public alley in the block bounded by South Halsted street, West 39th street, Emerald avenue and West 40th street, together with your request for an opinion as to whether or not the City Council has the power to pass an ordinance of the character in question.

In reply, we beg leave to advise you that the power of the City Council to pass an ordinance of this character has been passed upon repeatedly by the Supreme Court of the State of Illinois, and the power of the council to do so has been uniformly denied by our Supreme Court.

In 1907 the City Council of Granite City passed an ordinance granting to a corporation of that city power and authority to construct at its own cost a bridge across one of the streets connecting the syrup house of the Corn Products Refining Company with its can factory. In discussing that question the Supreme Court in the case of *People v. Corn Products Company*, 286 Ill., on page 231, said:

“Did the City Council in this case have power to pass ordinance No. 195, permitting appellants to build an overhead bridge across the street in question? If it did not have that power then the question is not one of legislative discretion or motive in the exercise thereof, as there can be no exercise of discretion when there is no power to act at all.

“Cities are vested with power to lay out, establish, open, alter and vacate streets and to regulate the use of the same. (Hurd’s Stat. 1917, Sec. 1, par. 7, p. 320.) They are likewise vested, by paragraph 10 of said section, with the power, and it is their duty, to prevent and remove encroachments or obstructions on the same. It has been the law of this state by statute since 1845, that ‘to obstruct or encroach upon public highways, private ways, streets, alleys, commons,’ etc., shall constitute a public nuisance. At the time the overhead bridge in question was built and at the time the City Council passed the ordinance authorizing the building thereof Nineteenth street was a public street in the City of Granite City, and the question is presented, does this overhead bridge ‘obstruct or encroach upon’ the street in question so as to constitute a public nuisance, and if it is such a nuisance can the City Council by ordinance authorize the maintenance of such nuisance by citizens for private use? That the purpose of building said bridge was for private use there can be no doubt. It is admitted that the appellant owns, controls and devotes to its exclusive use the property on both sides of this street at the point where said bridge was built. The ordinance sets out that said bridge is to connect the building of appellant known as ‘the syrup house’ with ‘its can factory.’ The ordinance was passed, as the ordinance itself indicates, at the special instance and request of appellant. The mere fact that the ordinance recites that ‘it is deemed advisable and beneficial to said city and those concerned’ to permit the building of the bridge is by no means conclusive on the question as to whether or not the ordinance gives over a public street for private use. The law will look to the

substance and not the form used. The City Council will not be permitted to do indirectly what it cannot do directly. The substance is not to be lost sight of in the mere use of words. (*People v. Atchison, Topeka and Santa Fe Railway Co.*, 217 Ill. 594; *Ligare v. City of Chicago*, 139 *id.* 46.) It is evident from the matters set out in the ordinance and its preamble that this bridge was not to be built for public use but solely for the private use of appellant, and the mere recital that it is deemed to be for the benefit of the public, where the ordinance itself shows it is not, will not aid in the contention that the City Council, by the passage of such ordinance, acted in the interest of the public or that the purpose of said ordinance was a public purpose.

"The power of a City Council to by ordinance authorize the use of public streets or parts thereof for private purposes has been uniformly denied by this court. The rule is well settled that when a public street is once established all the beneficial uses vest in and devolve upon the public. These uses include the uninterrupted, unimpeded and unobstructed use of every portion and part of such public highway,—not only that they may use all the ground for foundation to travel upon, but that they may likewise enjoy the uses of the air above and the ground beneath the surface. (*People v. Harris*, 203 Ill. 272.) In *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, this court said: 'The right of the public to the exclusive use of the streets for public purposes is inconsistent with the right of a private citizen to encroach thereon by the erection of a permanent structure. The streets are held in trust by the municipality, and this fact prevents the municipality from authorizing any encroachment on or obstruction of them by such structures.' "

After a careful examination of the statutes and of the decisions of our Supreme Court it is our opinion that the City Council is without power to pass the ordinance in question, and that the said ordinance, if passed, would be void.

We, therefore, recommend that your committee place the ordinance on file.

Yours very truly,

JAMES W. BREEN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTTELSON,

Corporation Counsel.

Transfer of Funds from One Council Committee to Another.

December 23, 1919.

HON. JOHN A. RICHERT, Chairman Committee on Finance.

Dear Sir:

We are in receipt of a letter from Alderman Thomas J. Lynch in which he states that you wish to be advised whether it is permissible to transfer funds, appropriated in 1919 for one council committee, to another council committee.

The statute permits the making of transfers "within the department or other separate agencies of the municipal government." The question presented is whether or not a committee of the City Council is a separate agency of the municipal government within the meaning of the term as used in the statute.

There is no doubt that the City Council in appropriating for the various committees treated them as if they were separate agencies of the government, and aside from this intention on the part of the City Council there is much to be said in favor of such a construction. But in spite of that there is an element of inconsistency in regarding a committee of the City Council as a separate agency of the municipal government. It is in the fullest sense a separate agency of the City Council but it is doubtful whether any committee that is not established by either statute or ordinance can be regarded as a separate agency of the government. The committee on finance seems to be the only one which has such standing. All others are created by the rules of the City Council which can be set aside at will under the conditions named in said rules.

We are unable to find any court decision which will serve as a guide in determining what is a separate agency of the municipal government. There are several cases indicating that the courts are quick to regard a separate crew of a train as a separate branch or department of a railroad company upon a question of liability for the injury of employes, but they furnish no criterion as to the meaning of the words in the statute before us.

We are, therefore, disposed to follow the rule that we have adopted heretofore. We have assumed that this new section of the statute was placed there in order to facilitate the work of the City Council which was unnecessarily hampered by the rigid provisions that it overcomes, and this has led us to the conclusion that the provision should be construed as broadly and liberally as possible. Hence we are of the opinion that such transfer can be lawfully made.

Yours truly,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

**Public Cart License for Motor Truck Rented to
Common Carrier.**

December 23, 1919.

HON. IRWIN R. HAZEN, Judge Municipal Court of Chicago.

Dear Sir:

In response to your communication of the 20th inst., in which you request an opinion as to whether a motor truck rented out to a common carrier is required to have a public cart license, we are of the opinion that under the facts outlined the motor truck must have a public cart license according to Section 2635 of The Chicago Code of 1911, which is as follows:

“ALL SUCH AUTOMOBILES TO BE LICENSED.) Any automobile, autocar, or other similar vehicle, which shall be kept, used, operated or employed for the purpose of transporting or conveying bundles, parcels, trunks, furniture, baggage, goods, wares, merchandise or other similar articles, within the city, for hire or reward, and which (except as to motive power) comes within the description and definition of a public cart as described and defined in Section 2616 of Article III of this chapter, shall be licensed as prescribed and provided for in and by Section 2617 of said Article III, and the application for such

license shall be made in accordance with the provisions of Section 2618 of said Article III."

It appears that the defendant was hired by one H. Bendel to drive the motor truck in question, and that Bendel, the owner of the truck, rented the said motor truck by the day to the Brink's Express Co., a common carrier. Had Bendel rented the truck to a private individual or corporation to be used in the private business of the individual or corporation, then the truck would not need a public cart license because it was used in a private enterprise. But, in the case in question, Bendel rented the truck to the Brink's Express Co., which is a common carrier, and consequently the truck comes within the category of a public cart, as defined in Section 2616 of The Chicago Code of 1911 and must necessarily have a public cart license. This section reads as follows:

"PUBLIC CART DEFINED.) Every express wagon, furniture van, cart, truck, dray, wagon or other vehicle drawn by one or more horses or other animals, which shall be kept, used, operated, driven or employed for the purpose of transporting or conveying bundles, parcels, furniture, trunks, baggage, goods, wares, merchandise, or other articles within the city for hire or reward shall be deemed a public cart within the meaning of this article, and every such vehicle so described and defined herein as a public cart shall be deemed such whether employed or hired from any public stand or from any street or public way, or from any private barn, office or other place in the city. The place where any such public cart is hired or employed shall not determine whether such vehicle is a public cart, but the business in which such cart is engaged while on the streets and public ways of the city shall determine the character of such vehicle. It shall be immaterial in determining the character of any vehicle whether the driver or person in charge and control of any such vehicle solicits custom or accepts employment therefor from any private office or private place, or from or along any street or public way in the city; provided, however, that nothing herein contained shall be held to require a license for any vehicle or vehicles rented to any person or corporation for the purpose of transacting the business of such person or corporation, solely, but if any such vehicle be employed in and about the business of

more than one person or corporation for the purpose of transporting or conveying any of the articles hereinbefore in this section described, in such case any such vehicle shall be considered a public cart."

Under Section 2638 the driver under the circumstances would be guilty of a violation. Section 2638 reads as follows:

"OPERATING UNLICENSED PUBLIC CART—PENALTY.)

Any person or corporation who shall keep, use or operate, or be in charge, possession, or control of, or cause to be kept, used or operated, upon any of the streets or public ways of the city, any automobile, autocar, or other similar vehicle used as a public cart as defined in Section 2616 of Article III of this chapter, which has not been licensed in accordance with and pursuant to the provisions of this article, or who keeps, uses or operates, or causes to be kept, used or operated, any such automobile, autocar or other similar vehicle, in violation of any of the provisions of this article, shall be fined not less than five dollars nor more than one hundred dollars for each offense, and a separate and distinct offense shall be deemed to have been committed each day on which any such person or corporation shall so keep, use or operate or cause to be kept, used or operated, any such automobile, autocar or other similar vehicle, as a public cart, after the first offense."

Therefore, in our opinion, we believe that the defendant is guilty of violating Section 2638 in operating a motor truck without a public cart license.

Yours, very truly,

J. A. BUGEE,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel.

Interpretation of Search and Seizure Act.

December 31, 1919.

HON. JOHN J. GARRITY, General Superintendent of Police.

Dear Sir:

We have at hand your favor of the 26th instant requesting an opinion as to the duty of your department in connec-

tion with the Search and Seizure Act, particularly with reference to the transportation of intoxicating liquor.

In accordance with this request, we advise you as follows:

Our Supreme Court in the recently decided case of *People v. Marquis, et al.*, has held the Search and Seizure Act to be constitutional with the exception of those provisions of the act relating to the condemning of property seized for destruction.

This act consists of twenty-three sections and makes detailed provision for the manner of enforcing the act.

The subject of transporting liquor is treated in Sections 3, 6 and 7. The third section reads as follows:

“Whoever, shall, within prohibition territory, by himself, either as principal, clerk or servant, in any manner manufacture, keep for sale, order, purchase, receive, transport upon any highway, cause to be transported upon any highway, take an order for, sell, give away, or dispose of, or aid any persons in procuring any intoxicating liquor in any quantity whatsoever, shall be punished in the manner prescribed in Section eight (8) of this act; *Provided* that nothing in this act shall be construed * * * to forbid any consignee from transporting his vessel or package of intoxicating liquor from the nearest place of delivery to the nearest carrier to the place where such liquor is to be used; nor to forbid any person to whom any druggist of the county has lawfully delivered any bottle or vessel of intoxicating liquor from transporting such liquor to the place where it is to be used in such county.”

Sections 6 and 7 provide for the labeling of packages and making and keeping of records relating to the liquor being transported by carriers.

Section 3 defines the crime. Section 8 fixes the penalty. Sections 16 to 23 inclusive deal with the method of enforcement.

This act having been held constitutional, except as noted, your duties are in the main similar to those arising under any other criminal act of the state, *i. e.*, to enforce it to the best of your ability.

Most of the provisions of the act defining what constitutes a violation thereof, fixing the penalty and the method of en-

forcement are clear and certain in their meaning. Other sections are not so free from doubt and the attorney general has been called upon to render opinions regarding the same.

One of these questions was, does Section 3 forbid the use of liquor by an individual in his own home, and the serving of the same to his guests? In passing upon this question the attorney general stated, among other things, the following:

“This statute is highly penal in its provisions and according to well recognized canons must be construed strictly, keeping in mind the great central object the Legislature had in view in its enactment, and the evils to be prevented * * * A reading of the entire act discloses the fact that the Legislature intended by this law to prohibit the manufacture, transportation, sale and trafficking in intoxicating liquors, except for medicinal, sacramental, chemical and manufacturing purposes. The law does not seek to interfere with the private stock of intoxicating liquors now in the possession of the householder. * * *

“It is my opinion that the provisions of the Search and Seizure Law forbidding a person to ‘give away or dispose of, or aid any person in procuring any intoxicating liquor in any quantity whatsoever’ when construed with all the provisions of the Search and Seizure Law, would not make it unlawful for a person to serve intoxicating liquors to his family or *bona fide* guests in his residence or apartment in the course of the hospitality ordinarily shown guests. * * *

“Section 3 of the law enumerates all those things which are forbidden. Section 3 does not in terms forbid the use of intoxicating liquor. * * *

“I can find nothing in the reading of the entire bill which would lead me to the conclusion that the Legislature intended to prohibit the use of intoxicating liquor.

“It is my opinion that the mere use of intoxicating liquor by an individual is not forbidden by the provisions of this law, and that places where intoxicating liquors are used, in any manner that is not in violation of the provisions of this act, do not render such places a common nuisance.

“The Legislature had in mind, in the passage of the Search and Seizure Law, the recent amendment to the Constitution of the United States prohibiting the importation, manufacture, transportation and sale of intoxicat-

ing liquors. This act is designed to do away with the liquor traffic except for medicinal, sacramental, chemical and manufacturing purposes. The law contemplates, by forbidding the transportation upon any highway or the selling or buying of any intoxicating liquors, that the traffic shall eventually be done away with. The Legislature was obliged to deal with the situation that many householders had intoxicating liquors in their possession that will be consumed before the traffic will be entirely done away with, except for the limited purposes described in the act. The law provides for confiscation and destruction of this intoxicating liquor, now in the possession of the individual, only in case it is sold or disposed of contrary to the spirit of this law."

This is the opinion of the chief law officer of the state as to the interpretation of that feature of the question and unless and until the courts hold otherwise, you may safely follow his ruling as to the intent of the Legislature, and the scope of the law.

The act is otherwise reasonably comprehensive in its details for enforcement, and we believe that extended comment on that phase of it is unnecessary.

Respectfully yours,

HENRY T. CHACE, JR.,
Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,
Corporation Counsel.

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